IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1241

PEPI, INC., PHILIPS ELECTRONIC INSTRUMENTS, INC. and NORTH AMERICAN PHILIPS CORPORATION,
*Petitioners,*

v.

PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners PEPI, Inc., Philips Electronic Instruments, Inc. and North American Philips Corporation pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 7, 1978.

### Opinions Below

The Judgment Order of the Court of Appeals was rendered without opinion, affirming two separate opinions of the United States District Court for the Western District of Pennsylvania reported at 435 F. Supp. 685 and 440 F. Supp. 1175. These followed an earlier decision by the Third Circuit reported at 531 F.2d 92, on appeal from the orig-

inal judgment on the jury verdict. Each of these opinions is reproduced in the Appendix to this Petition.

## Jurisdiction

The Judgment Order of the Court of Appeals was entered on September 7, 1978, and a timely petition for rehearing was denied on October 3, 1978. On December 15, 1978, this Court (per Mr. Justice Brennan) granted petitioners' motion for an extension of time to February 15, 1979 within which to file this petition for a writ of certiorari.[1] This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. §1254(1).

## Question Presented

Vertical restraints imposed by manufacturers on their dealers are, as this Court has observed, "widely used in our free market economy." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 57 (1977). Many of these manufacturers distribute their products not only through such dealers but, in addition, through direct or "branch" sales —a pattern commonly denoted "dual distribution."

Two decisions of this Court—*White Motor Co.* v. *United States*, 372 U.S. 253 (1963), and *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)—teach that restraints imposed by a manufacturer on its dealers do not lose their vertical nature merely because the manufacturer also makes direct sales. Nevertheless, some lower courts, including the

[1] The Court of Appeals' Judgment Order and order denying rehearing, and Mr. Justice Brennan's order extending the time within which to file this petition are reproduced in the Appendix hereto.



court below, have erroneously concluded that if a manufacturer distributes both through dealers and directly, any restrictions which it may impose on the dealers are *ipso facto* horizontal and thus illegal *per se*. Until the present case these decisions worked little mischief because they were rendered during the decade governed by *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), under which all resale restraints were *per se* unlawful whether horizontal *or* vertical. Now that *Sylvania* has overruled *Schwinn* and restored the rule of reason to the law of vertical restraints, the characterization of a restriction as vertical or horizontal assumes critical significance.

The decision below perpetuates the erroneous line of cases into the post-*Sylvania* era and squarely conflicts with a number of recent contrary decisions which correctly apply the precedents of this Court. Clarification of this issue is therefore a matter of substantial concern. Petitioners accordingly urge this Court to grant certiorari and to decide the following question:

**If a manufacturer sells both through dealers and directly through company-owned branches, are territorial restrictions which it imposes on the dealers necessarily horizontal restraints, illegal *per se*, or must the trier of fact assess their legality, under *Sylvania*, by weighing both their pro-competitive and anti-competitive effects pursuant to the rule of reason?**

## Statutory Provision Involved

Section 1 of the Sherman Act, 15 U.S.C. §1, provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

## Statement of the Case

Petitioners PEPI, Inc., Philips Electronic Instruments, Inc. and North American Philips Corporation (hereinafter collectively referred to as "Philips") are related companies engaged in the importation, manufacture and sale of sophisticated electronic instruments, including scientific and industrial X-ray equipment and electron microscopes. Philips distributes these products to consumers (primarily businesses, research organizations, universities and governmental institutions) both through dealers and directly through company-owned branches. As described in the opinions below, Philips assigned each dealer and each branch a territory, and as a rule no dealer or branch was permitted to sell outside of its assigned territory. 531 F.2d 92, 101 (27a-28a).[2] In the event an extraterritorial sale took place, a portion of the sales commission earned was to be paid over to the dealer or branch in whose territory the sale was made. *Id.* at 102 (28a).[3]

Respondent Pitchford Scientific Instruments Corporation (hereinafter referred to as "Pitchford") was a Philips dealer until September 1970, when Philips exercised its option to terminate the dealership agreement. Pitchford commenced this suit shortly thereafter in the Western District of Pennsylvania, charging Philips with price fixing, exclusive dealing, full-line forcing and imposition of territorial restrictions.

[2] References to pages in the Appendix are abbreviated herein as "(—a)."

[3] Philips promised not to appoint additional dealerships in any dealer's territory. It also reserved to itself the right to deal directly with governmental entities and national accounts wherever located. 531 F.2d at 101 (27a-28a).



The case was tried in 1974 before Hon. Edward Dumbauld and a jury, which was instructed, *inter alia,* that territorial restrictions were unlawful *per se.* (4a-11a). The jury returned a verdict in favor of Pitchford. On appeal, the Court of Appeals for the Third Circuit reversed the judgment insofar as it was premised on the price-fixing and exclusive dealing charges for failure to prove fact of damage, and it reversed the judgment insofar as it was premised on the full-line forcing charge for failure to prove a substantial effect on competition. 531 F.2d 92, 98-101 (19a-27a). Only the territorial restriction claim survived.[4]

On that issue, the Court of Appeals held that Philips' territorial restriction policy constituted a *per se* unlawful vertical restraint under *Schwinn.* 531 F.2d 103 (32a). In addition, the Court held that, because Philips was engaged in dual distribution, that policy could also be found to be a horizontal division of territories, likewise unlawful *per se.* 531 F.2d at 104 (33a).[5]

After denial of petitions for rehearing filed by both sides, and this Court's denial of cross-petitions for writs of certiorari, 426 U.S. 935 (1976), the case was remanded to the District Court for trial on the issue of damages. Five days before the damage retrial was scheduled to begin, this

[4] Pitchford was eventually awarded damages not only for injury from the territorial restriction but also for injury purportedly resulting from the termination itself, even though the complaint did not allege that Pitchford's termination resulted from Philips' territorial policy, and no proof was offered that the termination was related to that policy. There had been no finding regarding termination, and the Court of Appeals remanded only the territorial count for consideration of damages.

[5] The court found that, since Philips operated its own sales branches, the record revealed "an explicit agreement between [Philips] and each dealer to divide territories. Thus," it concluded, "a horizontal restraint, a *per se* violation of the Sherman Act, could be found . . . ." 531 F.2d at 104 (33a).

Court announced its decision in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), overturning the *per se* rule of *Schwinn.* Philips promptly petitioned the Court of Appeals to recall its mandate. The Court of Appeals denied the requested relief and, instead, ordered the District Court to determine whether there was any inconsistency between *Sylvania* and the Court of Appeals' prior opinion. (51a-52a).

The retrial on damages commenced before the jury in June 1977. In the course of that trial, Philips, relying on *Sylvania,* moved alternatively for judgment n.o.v. or for a new trial on liability as well as damages. The District Court denied these motions from the bench, later supplemented by an opinion dated July 13, 1977. 435 F. Supp. 685 (53a-62a).

The District Judge approached *Sylvania* with a marked degree of disapprobation. Judge Dumbauld observed that "it is probable that the *Continental T.V.* case will produce as much confusion and controversy as the *Schwinn* case which it superseded." 435 F. Supp. at 687 (57a). He noted with apparent preference for *Schwinn*'s application of the "ancient rule against restraints on alienation" that, although *Sylvania* has revitalized the distinction between vertical and horizontal restraints,

> "*A priori* one would have supposed that this was a factitious and unprofitable distinction . . . . One would also have supposed that the transfer of title test affords a simple and workable rule, based on the fundamental distinction between *meum* and *tuum.* One's power to do what he will with his own (see Mt. 20:15) would seem quite different from his power to do what he will with the property of someone else." *Id.* (56a-57a).



The Judge did concede that "[f]or present purposes, however, we must accept *Continental T.V.* as the *dernier cri* on the subject matter involved." *Id.* at 688 (57a). But instead of applying the law as settled by this Court, he proceeded to "distinguish" it on grounds that are demonstrably erroneous, as explained below. Concluding that *Sylvania* "does not appear to be applicable to the case at bar," *id.* at 689 (62a), the District Court denied Philips' motions.

At the retrial on damages, the jury returned a verdict in favor of Pitchford in the amount of $312,349. After entry of judgment for treble damages of $937,047, Philips renewed its motions for judgment n.o.v. or a new trial; but both motions were denied without opinion.[6] On appeal, a panel of the Third Circuit affirmed, also without opinion. (75a-76a). A motion for rehearing was denied on October 3, 1978 with two judges dissenting (77a-78a), whereupon, after this Court extended petitioners' time within which to seek further review (79a), this petition was filed.

[6] The District Court, in a separate opinion dated November 23, 1977, awarded attorneys' fees to counsel for plaintiff at double their normal billing rate. 440 F.Supp. 1175 (63a-74a). This fee was not to come from a class fund as in the cases relied upon as precedent for such multiplication, but from Philips, pursuant to 15 U.S.C. § 15, which provides only for the recovery of a "reasonable" fee. In these times of public indignation at the cost of legal services, such ballooning of fees ought not to be countenanced. The illogic of the lower court's ruling becomes manifest when it is recognized that while plaintiff has been awarded $592,091 in counsel fees, plaintiff's counsel has agreed to accept 25% of the total of (a) the jury damage verdict (trebled) plus (b) the court-awarded attorney's fees. The District Court's methodology in computing a reasonable attorney's fee does not comport with Congress' intention in enacting Section 4 of the Clayton Act. Petitioners, however, would not burden this Court with a petition to review this issue alone, and mention it here only to preserve the question in the event this petition is granted to review the important question presented.

## Reasons for Granting the Writ

Dual distribution—the practice whereby manufacturers sell their goods both through dealers and directly through branches—is a common feature of the American economy. Many of these same manufacturers also impose resale restraints on their dealers, frequently in the form of territorial restrictions.[7] The significance of this practice is illustrated by a current report of the Department of Commerce which reveals that in the realm of franchising alone, nearly twenty percent of all outlets are "company-owned."[8] Fully seventy percent of all franchise systems include at least some company-owned outlets.[9] The continued viability of these arrangements is seriously threatened by the lower courts' *per se* condemnation of territorial restrictions imposed in a dual distribution context. In fact, all distribution restraints are beclouded by the District Court's cavalier criticism and circumscription of *Sylvania*'s rule of reason doctrine. Review by this Court is accordingly needed to settle the important issue of *Sylvania*'s applicability to dual distribution arrangements,

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[7] This practice is widely documented in the literature and the case law. *See, e.g.*, ABA ANTITRUST SECTION, MONOGRAPH No. 2, VERTICAL RESTRICTIONS LIMITING INTRABRAND COMPETITION (1977).

[8] U.S. DEP'T OF COMMERCE, FRANCHISING IN THE ECONOMY, 1976-1978 at 30 (1978). (The precise figure for 1978 was 18.7 percent out of almost half a million establishments.) While the arrangement in the present case does not involve "franchising" as that term is commonly understood, the Commerce Department figures nonetheless provide a pointed illustration of the widespread incidence of dual distribution since franchise systems currently account for roughly one-third of all retail sales. *Id.* at 11. The Commerce Department study does not provide data on non-franchised distribution.

[9] As reported by Andrew Kostecka, author of the Commerce Department report, of 1,166 franchise systems surveyed, 810 had some company-owned establishments. (80a-81a).



so that this Court's landmark decision will be properly construed to provide enlightenment—not "confusion"—to this area of the law.

### I.

### The Decisions Below Are in Direct Conflict With Holdings of This Court and Lower Courts.

This Court held in *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), that in deciding whether distribution restraints should be treated as vertical or horizontal, the determinative criterion is whether the restraints are imposed *on* the dealers by the manufacturer or are in reality a sham, induced by an arrangement *among* the dealers. 388 U.S. at 352. *Sylvania* reaffirmed this critical distinction, noting that in passing upon resale restraints it is necessary to "differentiat[e] vertical restrictions from horizontal restrictions *originating in agreements among the retailers.*" 433 U.S. 36, at 58 n. 28 (emphasis added). Whether or not the manufacturer engages in dual distribution, resale restraints are not properly treated as horizontal unless, unlike the restraints in the present case, they are the invention of the dealers, foisted upon the manufacturer—as was the case in *Sealy* and in *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), and *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972).[10]

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[10] *See* Sandura Co. v. FTC, 339 F.2d 847, 857-58 (6th Cir. 1964) (the mere fact that distributors refuse to handle a product without a guarantee of territorial exclusivity "is not sufficient basis for finding a horizontal conspiracy among them"); and Newberry v. Washington Post Co., 438 F. Supp. 470, 474 n. 5 (D.D.C. 1977), in which Judge Gesell held that "Notwithstanding the dealers' willing participation, . . . the [territorial] scheme was initiated and orchestrated by the Post, and thus was vertical in effect as well as appearance." The *Newberry* court distinguished *Sealy* and *Topco* on the ground that in those cases "the dealers

This Court's opinion in *White Motor Co.* v. *United States*, 372 U.S. 253, 256 (1963) is illustrative. There, a manufacturer reserved certain categories of customers to itself, excluding its dealers. The Court treated this customer restraint as vertical and subject to the rule of reason, despite Justice Clark's dissent which argued, at 372 U.S. 280, that the arrangement amounted to a horizontal "withholding of customers" under *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

Similarly, in *Schwinn* the manufacturer sold directly to the majority of its outlets under a consignment arrangement, while reaching other outlets through distributors who were subject to territorial and customer restraints.[11] Despite Schwinn's dual distribution, the Court characterized the restraints imposed on its distributors as "truly vertical," 388 U.S. at 378, emphasizing that "[t]he source of the restriction is the manufacturer." 388 U.S. at 372.

A number of Federal Trade Commission and lower court decisions are to the same effect, holding that dual distribution does not render resale restraints horizontal. *Coca-Cola Co.*, Trade Reg. Rep. (CCH) No. 330 (Supp.) at 7-15 (FTC 1978), *appeal filed on other grounds*, No. 78-1364 (D.C. Cir., filed April 24, 1978); *Adolph Coors Co.*, 83 F.T.C. 32 (1973), *aff'd*, 497 F.2d 1178, 1182 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *Edwin K. Williams & Co.* v. *Edwin K. Williams & Co.-East*, 377 F. Supp. 418, 424-25 (D.C. Cal. 1974), *aff'd*, 542 F.2d 1053 (9th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

actually controlled the manufacturer"; and it distinguished *General Motors* on the ground that there "the dealers prevailed upon the manufacturer to impose territorial restrictions." *Id.*

[11] The manufacturer also engaged in dual distribution by selling directly to B.F. Goodrich Company, which sold in part through wholly-owned retail outlets. 388 U.S. at 369. The manufacturer also sold directly to "certain distributors for resale by them as *retailers*." United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 327 (N.D. Ill. 1965), *rev'd in part*, 388 U.S. 365 (1967) (emphasis added).



In fact, every appointment by a manufacturer of an exclusive representative in a territory involves a promise—explicit or implicit—by the manufacturer not to sell in that territory directly; yet such arrangements have uniformly been treated as vertical and virtually *per se* lawful. *E.g.*, *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Burdett Sound, Inc.* v. *Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975); *see* ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 21 n. 60 (1977).

## II.

## The Decisions Below Impermissibly Extend *Per Se* Interdiction to a Practice Not Shown to Be Either "Pernicious" or Without "Redeeming Virtue."

*Sylvania* reaffirms the rule of reason as "the standard traditionally applied" in assessing anticompetitive practices and makes it clear "that departure from the rule-of-reason standard must be based upon demonstrable economic effect." 433 U.S. at 58-59. *Sylvania* also instructs that:

> "*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Id.* at 49-50.

The lower courts in this case neither sought nor found "demonstrable economic effect" as a basis for departing from the rule of reason. Their rulings have improperly extended the *per se* doctrine without an empirical determina-

tion that resale restrictions in the context of dual distribution "have or are likely to have a 'pernicious effect on competition' or that they 'lack . . . any redeeming virtue.'" 433 U.S. at 58 (quoting *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5 (1958)). The courts below mechanically pigeonholed the restraints as "horizontal," in conflict with *White Motor* and *Schwinn,* and proceeded to hold them illegal *per se* without ever addressing their effect on competition. That methodology flies in the face of *National Society of Professional Engineers* v. *United States,* 98 S.Ct. 1355, 1365 (1978), which holds that agreements may be classified as illegal *per se* only if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."

Properly analyzed, the territorial restraints in this case should be treated as vertical under *White Motor* and *Schwinn,* and must, therefore, be appraised under *Sylvania*'s rule of reason standard, weighing their anticompetitive effects against their procompetitive virtues. The procompetitive effects of vertical restraints identified in *Sylvania*[12] are no less present when the manufacturer is a dual distributor than when it sells only through dealers. *See* 433 U.S. at 55. Regardless of whether territories are assigned to branches owned by the manufacturer, the imposition of territorial restrictions on the dealers can heighten interbrand competition by focusing the efforts of each dealer on competition from other brands within its own territory—the principal procompetitive factor relied upon by this Court in *Sylvania.*

As Justice Powell pointed out, interbrand competition "is the primary concern of antitrust law," 433 U.S. 52 n. 19,

[12] For example, eliminating the "free rider" effect in order to encourage dealers to engage in promotional activities and to provide services.



and it can be effectively promoted by territorial restraints whether or not some of the territories are reserved for direct sales. To impose *per se* illegality mechanically, based simply upon the presence of company-owned branches, amounts to the kind of "formalistic line drawing" against which this Court has admonished, 433 U.S. at 59, in utter disregard of the underlying economic realities. *Sylvania* demands the more rigorous approach and more searching analysis eschewed by the courts below.

## III.

### The Courts Below Erred in Holding That *Sylvania* Is Inapplicable to This Case.

Judge Dumbauld—who was affirmed by the Court of Appeals without opinion—endeavored to distinguish *Sylvania* on three grounds, none of which withstands analysis. First, he commented that *Sylvania* "deals only with vertical restrictions" while in this case, he said, "the Court of Appeals found that the evidence established a *horizontal* restraint . . . ." 435 F. Supp. at 688 (58a). The only authority cited for this construction of *Sylvania* was footnote 28 of this Court's opinion, which merely points out that vertical restraints should be distinguished from "horizontal restrictions *originating in agreements among the retailers,*" with "restrictions in the *latter* category [being] illegal *per se.*" 433 U.S. 36 at 58 n. 28 (emphasis added). That language, of course, simply reaffirms the settled principle that the controlling distinction between vertical and horizontal restraints is whether they are the "creature" of the manufacturer or the "product of a horizontal arrangement" among the dealers. *United States* v. *Sealy, Inc.,* 388 U.S. 350, 352 (1967); *United States* v. *Topco Associates, Inc.,* 405 U.S. 596 (1972); *United States* v. *General Motors Corp.,* 384 U.S. 127 (1966).

In this case, the territorial restrictions were unquestionably imposed unilaterally by Philips. There was no finding by the jury, no finding by the District Court, and no finding by the Court of Appeals that they were the "product of a horizontal arrangement" among the dealers.[13] To the contrary, there was only the conclusory statement of the Court of Appeals on the first appeal that, since Philips was a dual distributor, a horizontal restraint could be found. This *ipse dixit* was cited without elaboration by the District Court and reaffirmed by the Court of Appeals without opinion, but it is wholly insufficient to establish horizontality originating in agreements among the retailers under the standard established by the authorities discussed above.

Second, Judge Dumbauld remarked that *Sylvania* "dealt only with a 'location' clause . . . ." 435 F. Supp. at 688 (58a). This misapprehension is wholly dispelled by Justice Powell's explanation that

> "In intent and competitive impact, the retail-customer restriction in *Schwinn* is indistinguishable from the location restriction in [*Sylvania*]. . . . The fact that one restriction was addressed to territory and the other to customers is irrelevant to functional antitrust analysis . . . ." 433 U.S. at 46.

This Court emphasized that "we are unable to find a principled basis for distinguishing *Schwinn* from [*Sylvania*]." *Id.* Consequently, throughout the *Sylvania* opinion the focus was on vertical restraints, not merely location clauses. The question ultimately addressed by this Court was whether non-price "*vertical restrictions* must be 'conclusively presumed to be unreasonable'" or would be governed by the rule of reason. *Id.* at 57 (emphasis added). To construe *Sylvania* as limited to location clauses is to miss the point of the analysis: "Although distinctions can be drawn among the frequently used restrictions, we are inclined to view them as differences of degree and form." *Id.* at 58 n. 29; *accord, General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147, 1153-54 (7th Cir. 1978) (expressly rejecting Judge Dumbauld's analysis).[14]

[13] Indeed, the case was tried on a vertical theory. When plaintiff requested charges on both horizontal and vertical restrictions, the District Court rejected plaintiff's assertion that there was a horizontal element to this case and refused to give an instruction on a horizontal theory. (1a-3a).



Third, the District Judge stated that *Sylvania* was distinguishable because it "dealt with a location restriction standing alone, and unconnected with a price-fixing plan." 433 F. Supp. at 688 (59a). He deemed it "manifest" that in the present case Philips' "territorial restrictions were part and parcel of a comprehensive price-fixing policy." *Id.* at 689 (60a). But the jury made no finding that Philips' territorial restrictions were bound up in price fixing, nor was such a finding made by the Court of Appeals.[15] Nevertheless, the District Judge assumed that the territorial restrictions were "part and parcel" of a price-fixing scheme. Not only is there no basis for such an assumption, but it is wholly inconsistent with the holding in this case that respondent suffered no injury whatsoever from any price-fixing activity, but was injured only by the territorial restriction. *Compare* 531 F.2d at 98-99 (21a-22a) *with* 531 F.2d at 104-05 (35a-37a). This necessarily negates the proposition that one was "part and parcel" of the other,

[14] In his concurrence in *Sylvania,* Justice White specifically focused on the fact that the majority had gone beyond location clauses and had rendered a decision affecting all non-price vertical restraints. 433 U.S. 36, at 69-71.

[15] With respect to price fixing, the Court of Appeals found only that "[s]ufficient evidence was presented to support a finding by the jury that [Philips'] pricing policies constituted a violation of section 1 of the Sherman Act." 531 F.2d at 98 (20a).

for if price fixing had been part of the same restraint as the territorial limitation, it would have to have been a concurrent cause of injury. In contrast, the jury in *Sylvania* was specifically directed to find whether Sylvania had engaged in "location restrictions and price fixing as an integral part of a single distribution policy." 537 F.2d at 985-86 n. 6. Here, no such finding was requested or made. The price-fixing judgment was reversed on the first appeal by the Court of Appeals, which never suggested that the territorial limitations were enmeshed with price fixing in any way.

Finally, Judge Dumbauld concluded that even if this case had been tried under the *Sylvania* standard,

> "the outcome would have been no different . . . because in fact the trial court permitted defendants to offer all the testimony which they desired to present in order to show that the territorial restrictions which they included in their dealer contracts were in fact reasonable, and were justified by the nature of the product, its danger to the public if not properly operated, and the need for expert service." 435 F. Supp. at 689 (61a).

That conclusion totally disregards the critical fact that the case was submitted to the jury under an instruction which expressly treated the territorial restrictions as *per se* unlawful.[16] Given that instruction, the jury was not permitted to consider the restriction's reasonableness—a circumstance plainly erroneous in light of *Sylvania.*



Moreover, the evidence cited by the District Court was assembled and introduced for the limited purpose of attempting to bring Philips within the narrow "health and safety" exception to the *Schwinn* rule which derived from *Tripoli Co.* v. *Wella Corp.,* 425 F.2d 932 (3d Cir.), *cert. denied,* 400 U.S. 831 (1970), or within the "expert service" exception suggested by *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961). Judge Dumbauld recognized as much, stating that "Defendants were doubtless seeking the benefit of a holding such as that in [*Tripoli*] or [*Jerrold*]." 435 F. Supp. at 689 n. 9 (61a n. 9). In light of the prevailing *Schwinn* rule, Philips had no opportunity to introduce the comprehensive evidence of procompetitive effects which, under *Sylvania,* is now significant in the balancing required under the rule of reason. *See* 433 U.S. at 54-55. A new trial—at which the jury can assess the weight of such evidence under a proper rule-of-reason instruction—is accordingly required.

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[16] "Now, the only one of these per se violations which we need to talk about now is the one regarding price fixing, and allocation of territory and of customers.

. . . .

Another refinement, which we don't need to go into here, is another recent Supreme Court case about bicycles. The name of that company was Arnold Schwinn.

The point here is that the per se violation consists in fixing resale prices of articles or products or commodities, merchandise, with respect to which the original seller has parted with dominion, title, control, or risk.

. . . .

So restrictions on territory or restrictions upon customers involving, as always, the situation where the original seller has completely parted with dominion or title or ownership, control or risk, is a per se violation." (5a, 7a, 10a).

The pertinent pages of the jury instruction are reproduced in full in the Appendix. (4a-11a).

## IV

**The Standard Applied Below Was Based on a Misinterpretation of Law.**

The conclusion reached below that dual distribution renders territorial restraints horizontal finds its basis in the Third Circuit's decision in *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), cited by the Court of Appeals at 531 F.2d 103 (32a-33a). That case, together with a number of other decisions from the *Schwinn* era, relied upon this Court's opinion in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), to suggest that all resale restraints imposed by manufacturers engaged in dual distribution must be treated as horizontal and *per se* unlawful. *See Hobart Brothers Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir.), *cert. denied,* 412 U.S. 923 (1973); *United States* v. *Ciba-Geigy Corp.*, 1976-1 Trade Cas. ¶ 60,908 (D.N.J. 1976); *Interphoto Corp.* v. *Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y.), *aff'd per curiam,* 417 F.2d 621 (2d Cir. 1969).

*McKesson,* however, held only that a manufacturer which also functioned as a wholesaler could not enforce fair trade agreements with its wholesale distributors because the Miller-Tydings and McGuire Acts' fair trade exemption from antitrust did not extend to agreements "between wholesalers." The fallacy in analogizing from this narrow holding to the treatment of non-price restraints under the Sherman Act was cogently identified in a recent opinion of the Federal Trade Commission. *Coca-Cola Co.*, TRADE REG. REP. (CCH) No. 330 (Supp.) at 8-10 n. 11 (FTC 1978), *appeal filed on other grounds,* No. 78-1364 (D.C. Cir., filed April 24, 1978). The Commission correctly pointed out that *McKesson*'s finding of horizontality in a dual distribution situation was limited to an exercise of statutory interpretation of the Miller-Tydings Act and McGuire Act. It recognized that the construction applied in *McKesson* was designed to narrow the fair trade immunity for resale price maintenance which, like all exemptions from antitrust, was intended to be strictly construed. Such an analysis cannot properly be substituted for a showing that *non-price* restraints in the context of dual distribution have such "demonstrable economic effect" that they may be "conclusively presumed to be unreasonable and therefore illegal." *Northern Pac. R. Co.* v. *United States,* 356 U.S. at 5.[17]



The fact that the *McKesson* analysis was relied on in the above cases, and in the Third Circuit's 1975 opinion in the present case, reflects a relatively harmless lack of precision manifested during the *Schwinn* era, when resale restraints were illegal *per se* whether vertical *or* horizontal. Now that *Sylvania* has restored the rule of reason in a vertical context, it is of pressing importance that the Court correct this misunderstanding.[18] These cases are in direct conflict with *White Motor, Schwinn* and the other authorities cited in Point I above.

What is more, if the mere presence of dual distribution continues to be interpreted by some courts to render resale restrictions automatically *per se* unlawful, there is a substantial likelihood that many manufacturers will choose to

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[17] The *McKesson* argument was also made by Justice Clark in his dissent in *White Motor,* but was rejected by the majority. *See* p. 10, *supra.*

[18] The present case is not the only post-*Sylvania* decision to rely erroneously on the horizontality rule of the *American Motor Inns* line of authority. *See* Krehl v. Baskins-Robbins Ice Cream Co., 78 F.R.D. 108, 122-23 (C.D. Cal. 1978).

integrate forward and operate all of their sales outlets themselves. This was the danger raised by Justice Douglas in his separate opinion in *Standard Oil Co.* v. *United States,* 337 U.S. 293, 320-21 (1949) ("Standard Stations"), and by this Court in *Sylvania.*[19]

If clarification from this Court is not forthcoming, this discord will continue to haunt all manufacturers who sell both through dealers and through branches, and will in large measure frustrate the purpose of the *Sylvania* decision—to permit reasonable flexibility in the distribution of the economy's goods and services.

[19] As Justice Douglas pointed out, vertical integration would work "a tragic loss to the nation. The small, independent businessman will be supplanted by clerks." 337 U.S. at 321.

Justice Powell sounded the same warning:

> "To the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen." 433 U.S. at 57 n. 26.



## CONCLUSION

This Court is now presented with its first opportunity since *Sylvania* to correct the split in the lower courts on the proper antitrust treatment of territorial restraints imposed by a dual distributor before this split widens into a gulf. For all of the reasons described above we respectfully request that a writ of certiorari be granted.

February 9, 1979

Respectfully submitted,

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# APPENDIX

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**Excerpt from Trial Transcript, March 27, 1974**

UNITED STATES DISTRICT COURT

For the Western District of Pennsylvania

Civil Action No. 70-1461

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Arthur H. Pitchford and

Pitchford Scientific Instruments Corporation,

*Plaintiffs,*

vs.

Pepi, Inc., North American Philips Corporation and Philips Electronic Instruments, Inc.,

*Defendants.*

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[3078] * * *

Mr. Sweeney: Your Honor, I have one, I hope, one last question about the charge. Am I correct in assuming that you are going to charge the jury on both horizontal and vertical territorial restrictions?

I think it is very important that that charge be given.

The Court: I always have to think to see which is horizontal and which is vertical, so I dislike using those words myself, but that is just an idiosyncrasy.

[3079] But, I don't think we have any horizontal case here, do we?

Mr. Sweeney: I think we do. That is the reason why I think it is so important. We have the conspiracy between and among Van Waters & Rogers, Lico, and all of the deal-

ers with Philips; and that is a horizontal conspiracy, whereby they agreed collectively—

The Court: Including the plaintiff.

Mr. Sweeney: Including the plaintiff. I think that is a very important charge, Your Honor, and I would urge you in spite of your propensity not to use the words, to use them in this case, because I think it is important to the case.

The Court: What—

Mr. Sweeney: The reason a conspiracy doesn't seem obvious to us is that it is so obvious on the record. The conspiracy begins with a written contract and concludes with a wire from O'Connor to Bardel dealing with the violation of the policy, and I think it is very important that the vertical and horizontal nature of this conspiracy be made known to the jury because it obviates the problem that might arise with the question that ought not to be in in the first place.

[3080] And I am not re-arguing that, but I am just pointing out that that charge is important in light of the addition of that question.

The Court: Well, I suppose it is very true that vertical price fixing is illegal, and it is probably the classical case.

I might well mention it as an historical circumstance of the Trenton Potteries history, and so on, the stone pipe; but I really don't think you are going to win by proving that Van Waters & Rogers did anything to harm the plaintiff here.

Mr. Titus: Nor do I believe—

Mr. Sweeney: I am not urging or even suggesting that anyone else harmed Pitchford. What I am suggesting, Your Honor, is that they all signed contracts which clearly evidenced this not too well hidden conspiracy.



I think if Pitchford was damaged by Philips as a result of that, they have a right to recover from Philips. The fact that the co-conspirators are not here with us is of no consequence.

Mr. Titus: To charge on horizontal territorial assignments would be to add, I think, simply additional confusion to this already confused record.

[3081] I do not believe there is any basis for it, and we are dealing at most with a vertical arrangement, and I think it would simply unduly confuse the record.

Mr. Sweeney: I have stated my position, and I would like to know what your Honor is going to do, so I can adjust my closing accordingly.

The Court: Well, it doesn't impress me as much of a point for the plaintiff. It is, of course, true of a classical conspiracy.

Mr. Sweeney: A horizontal agreement is a per se violation of the anti-trust laws, and that is why it is of importance.

The Court: Yes, so is a vertical one, if there is a parting with title.

Mr. Sweeney: Yes, but I think I am entitled to the benefits of both in light of the facts as developed in this record, and I will—I don't intend to belabor it, Your Honor; that is my position.

The Court: Well, as I say, if it seems appropriate, maybe I will mention the history of the development of per se rules, but I don't think it is really pertinent to the case to any extent.

Well, are we ready to begin?

[3205] March 28, 1974
10:00 A.M.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(The Jury was seated.)

(The Court came to order.)

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen of the Jury, as the poet says, even the weariest river winds somewhere safe to sea, and so now our frail bark on which we set sail on St. Crispian's Day is now approaching port after many involutions of following the sinuosities and tortuosities of the antitrust laws.

And I trust that you have enjoyed your service as Jurors during this prolonged period of time. It is indeed an important and patriotic service, and I know that you will feel the rewards of having been able to devote this much time to the public business by assisting in the administration of justice in our Federal Court system.

I hope that you have also enjoyed the pleasure, like watching a tennis match between top competitors, and enjoying the various moves that are made by counsel.

We have been very fortunate in having before us counsel of marked ability and distinction, at the [3206] top of the Bar in this city, and they have conducted themselves with scholarly, gentlemanliness throughout the proceedings, and not engaged in any of the unprofitable disputations which sometimes mark the course of hotly contested court proceedings.





The time has now come when it is my duty to explain to you the principles of law that apply to this case; and it is your duty to accept the law as stated by the Court.

* * * * *

[3227] * * *

Now, then, in the famous case in 1911, I believe, involving the Standard Oil trust, with a prolix opinion by Chief Justice White, it was held Section 1 forbids only reasonable restraints of trade—I mean, unreasonable.

In other words, the effect of the Court's decision was to actually amend the Act by inserting the word "unreasonable", when you say contract, [3228] combination or conspiracy in unreasonable restraint of trade.

Now, however, there later were developed very important exceptions to the so-called rule of reason, and that gets us to what lawyers call per se violations. That is, it means conduct which in and of itself is a violation of the antitrust law. It is an unreasonable restraint. It is a restraint of trade in violation of Section 1, in and of itself, without regard to the reasonableness of the restraint.

Now, the only one of these per se violations which we need to talk about now is the one regarding price fixing, and allocation of territory and of customers.

That goes back to the old Addy Stone Pipe case, and another landmark in the law on price fixing was the Trenton Potteries case, involving bathtubs. Then another landmark was the Madison Oil case in 1940, which held that a plan devised by the oil companies to support the price of gasoline or oil in the market, which did not directly fix the price but which had an effect on price, is equivalent to price fixing in its primitive form.

In other words, the mere sophistication in [3229] devising a method of price fixing does not prevent it or permit

it to escape from the legal condemnation of price fixing as a per se violation of the antitrust laws.

What they did there was just buy up distressed gasoline. In other words, if somebody had a few tankcars somewhere that he had to get rid of in a hurry at any price at all; and there was danger that if that was put on the market generally, it would bring the price down.

The major companies had a system where somebody in that territory would buy up that distressed gas, and then they had greater financial resources and didn't have to sell it at a time when it would depress the market, but could hold it until later on; and this type of operation had a direct effect upon the level of prices, although it was not the primitive form of price fixing conspiracy, where the different companies would get together and say, "Now, today the price will be 52½ cents," or some specific figure; but merely a method that will result in price fixing would be a violation.

Or another system that was used, I think in the burlap bag industry, was to have a little manual prepared as to the dimensions of the bag and so on, [3230] so that the only thing you needed to know to get the price of a particular article, worked out to the penny, was what the current price of burlap, or hemp, or jute, or whatever the thing was; and that came to you by—you got a telegram every morning from some agency maintained by the bag companies, to give you the daily price of hemp in Indiana or wherever it is grown; and then from that, why, everybody would know exactly what the price of a bag of certain dimensions would be.



So, regardless of the complexity or the sophistication of the system that is used, any form of device that is maintained by two or more persons to fix the price of a commodity when it is sold is a per se violation of the Sherman Act, Section 1.

So that in this case, if you find that the defendant, through either its contracts with the dealers, or with any less formal arrangements with dealers, or other persons, brought about a fixing or establishment of the prices at which Philips products were to be resold by dealers, that is a per se violation.

Another refinement, which we don't need to go into here, is another recent Supreme Court case about bicycles. The name of that company was [3231] Arnold Schwinn.

The point here is that the per se violation consists in fixing resale prices of articles or products or commodities, merchandise, with respect to which the original seller has parted with dominion, title, control, or risk.

In other words, if you are an importer or a manufacturer, and you have got to market a product throughout the United States, you have various alternatives or options open to you as to how you are going to do it.

You can sell to wholesalers, and they can sell to retailers.

You can sell to your own dealers, as was part of what was done in this case, or you can set up your own branches or agencies.

Now, the basic principle of law applicable is that you cannot eat your cake and have it, too. Each method of marketing distribution has certain advantages and disadvantages, and if you opt for one method, you have to stick to that method; and you can't get by the use of one

method all the benefits that you might get from some other method.

Now, take the automobile business. You find a lot of dealers in different places that are [3232] spoken of and regarded as independent businessmen. They are putting up their own capital, investing their own money, and renting or buying a showroom, and fixing up signs and advertising, or making a nice environment for selling you automobiles.

Well, if the automobile manufacturer itself chose to establish dealerships, I mean, direct dealerships or its own agencies or branches, or whatever you want to call it, itself, all over the United States, that would involve a lot of money to set up all these necessary retail outlets.

So, if whoever makes cornflakes had a cornflake store in every city in the United States, there would be an astronomical amount of capital unnecessarily invested.

So, largely for the sake of being able to have other people use their money in distributing your product, you will often turn to some form of independent dealers or wholesalers, to whom you, the manufacturer or importer, will sell the product outright, and it is no longer your automobile or box of cornflakes or microscope. It belongs to the intermediate purchaser.

If a wholesaler bought it, it is his; and then he can sell it to retail stores.

[3233] Or if you have a local dealership, like automobile dealers or like the dealers like Pitchford was, for Philips Electronic products, that is an independent businessman who buys the product from the manufacturer. It is not theirs any more, it is his.

And consequently, in the case of an outright sale, where the original seller has parted with ownership, title, control,



and risk, then any effort to fix the resale price at which the dealer or wholesaler must sell to the next person down the line is a per se violation of the antitrust laws.

Now, as I have said, if you wanted to have your own cornflakes store in each community, you could then, since it is your employee, and it is your store, it is your agent who is selling it to the ultimate eater, you could make the price of cornflakes to the consumer whatever you chose, because it is your product. You own it. It is your cornflakes, and if you say it will be a dollar a package, well and good.

But if you have already sold it to a wholesaler or a dealer for, say, fifteen cents, and then tell him, "Now, although I have sold this to you and it is yours, yet you must sell it for a dollar a box [3234] to the ultimate consumer," that is a per se violation of the antitrust laws.

Now, whether or not such a violation took place in this case is a matter which you are to determine upon the evidence which you have heard. As I have said, you are the sole judges of the facts.

Now, another aspect of the Addy Stone Pipe doctrine of per se violations is the allocation of territory. I think in that case there were a number of companies that manufactured pipe.

It would be as if, taking the automobile industry again—As I say, I like to keep away from the facts of this case in giving illustrations of what the law is, for you are the sole judges of the facts; and if I mention anything about the facts in this case, it is purely by way of illustration of a legal point, and you are the sole judges of the facts.

But if, for example, it was agreed that General Motors would have all of Massachusetts, and Chrysler all of Pennsylvania, and Ford all of Ohio, then anybody who

wanted to buy an automobile in Pennsylvania, if you sent in an order to General Motors, they would send it back to Chrysler, who was supposed to handle this territory.

[3235] Such an allocation of territory or of people, that is, of customers, if particular customers are to be handled in a certain way, that is also a restraint of trade per se, because it is interfering with the right of a customer to give his business to whatever seller he chooses. You are channeling the flow of consumers. You are requiring consumer A to buy from dealer B, when he might prefer to buy from dealer C.

You are also infringing the right of dealer A to sell to customer X, Y or Z. You're saying, "You can sell only to persons who live here."

So restrictions on territory or restrictions upon customers involving, as always, the situation where the original seller has completely parted with dominion or title or ownership, control or risk, is a per se violation.

As I say, you have the option of marketing your product in the manner you choose. If you have your cornflakes store in each community, that involves you with a tremendous investment of capital. It also makes you subject, perhaps, to more lawsuits arising out of your business.

If your truck full of cornflakes collides with an automobile on the parkway, then the person who [3236] is involved in the collision can sue you, if your truck was negligent and ran through a red light or a stop sign and injured him.

So you, in your distant place of manufacture of cornflakes, would be liable to be sued for automobile personal injuries by every truck that is selling cornflakes all over the United States. That involves a lot of money, too, so maybe you want to avoid some of those risks that would be



involved in direct distribution, because this disadvantages are more important to you and outweigh the advantages of being able to fix the retail price to the consumer.

Therefore, you may elect to sell it to a wholesaler or to a dealer. But if you do, then that precludes you as a matter of law from trying to fix the retail price to the consumer.

I think that sufficiently covers the scope of the antitrust laws, as far as the Sherman Act is concerned, for the purposes of this case.

* * * * *

**Opinion of the United States Court of Appeals for the Third Circuit, December 24, 1975**

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

Nos. 75-1136 and 75-1137

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ARTHUR H. PITCHFORD and
PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION

v.

PEPI, INC., ET AL.,

*Appellants.*

---

Argued September 4, 1975

Decided December 24, 1975

As Amended February 6, 1976

* * * * * *

Before

VAN DUSEN, ADAMS and HUNTER,
*Circuit Judges.*

OPINION OF THE COURT

ADAMS, *Circuit Judge*

Plaintiffs, the president of a corporation that deals in scientific instruments and the corporation itself, brought an antitrust suit alleging that the practices of a manufacturer had illegally restricted their business opportunities and ultimately resulted in the termination of the dealer-



ship, causing damages to both the corporation and its president.[1] After trial before a jury, a verdict for $825,000 was returned which was trebled by the trial court, and an attorney's fee was awarded.

The manufacturer brings this appeal, asserting a series of contentions concernng the standing of the officer to sue, the proof of liability for the various antitrust violations set forth, the conduct of the trial, and the appropriate measure of damages in the event that liability was properly found. The manufacturer also complains about the amount of the attorney's fee that was awarded and about the absence of an adequate explanation for such fee.

I. BACKGROUND OF THE SUIT.

Pitchford Scientific Instruments Corporation (Pitchford Scientific), a Pennsylvania corporation, and Arthur H. Pitchford, president and holder of all but one per cent of the stock of Pitchford Scientific, are the plaintiffs in this action. Mr. Pitchford and Pitchford Scientific will both be referred to as Pitchford, except where necessary to distinguish their separate claims. The defendants are North American Philips Corporation (NAP), Philips Electronic Instruments (PEI), and Philips Electronics & Pharmaceutical Industries (PEPI).[2] All the defendants will be referred to as PEI.

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[1] The causes of action were based on section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), and section 3 of the Clayton Act, 15 U.S.C. § 14 (1970).

[2] PEI is a division of NAP. At the beginning of this action, PEPI was a subsidiary of NAP, but since that time has merged into NAP.

PEI markets three lines of sophisticated electronic instruments for industrial and scientific use: scientific and analytical, industrial, and medical. The alleged antitrust violations arose from Pitchford's handling of the scientific-analytical and industrial lines under an annual dealership contract with PEI. The dealership contract contained a clause allowing PEI to cancel the arrangement at any time, upon thirty days' notice to Pitchford. PEI exercised this option, and the Pitchford dealership came to an end on September 10, 1970.

In its complaint, filed December 24, 1970, Pitchford claimed that PEI had violated both the Sherman and Clayton Acts by policies designed to implement price-fixing, exclusive dealing, full-line forcing, and territorial sales restraints. The plaintiffs asserted that such conduct caused injury to them while Pitchford Scientific acted as a dealer for PEI and, further, resulted in the eventual termination of the dealership.[3]

Trial began on February 26, 1974, and in response to special interrogatories a verdict against PEI was returned on March 29, 1974. The verdict of $825,000 was divided as follows: $550,000 was awarded to Pitchford Scientific for the counts dealing with price-fixing, full-line forcing, exclusive dealing, and territorial restrictions;[4] $72,000 was awarded Mr. Pitchford for substantially the same violations; and $203,000 was awarded Pitchford Scientific for damages resulting from the termination of the dealership.

[3] Pitchford also alleged fraud and unconscionability with regard to the dealership agreement and its termination. The trial court entered a separate order granting a directed verdict to PEI on these counts, and that order has not been appealed.

[4] There was no specific allocation among these counts.



The $825,000 figure was trebled by the trial judge to $2,475,000.

On June 26, 1974, the court denied PEI's motions for a judgment notwithstanding the verdict and for a new trial. The court then awarded plaintiffs an attorney's fee in the amount of $645,250. On November 20, 1974, the trial judge denied PEI's motion for alteration of this award.

PEI appeals on six grounds:

1. It was entitled to a directed verdict because Mr. Pitchford lacked standing to sue as an individual, Pitchford failed to prove PEI's liability for price-fixing, exclusive dealing, full-line forcing, or territorial restraints, and there was no proof that the cancellation of the Pitchford dealership was related to any of the alleged antitrust violations.

2. In any event, PEI is entitled to a new trial because Pitchford introduced prejudicial material, improper hearsay, and inadmissible opinion evidence. In addition, PEI urges that a new trial is necessary since a considerable portion of the questioning by Pitchford's counsel regarding price-fixing was deliberately misleading and because Pitchford's counsel made improper remarks in his opening and closing arguments.

3. The evidence introduced by Pitchford on its lost profits and the value of the terminated dealership was improper.

4. The inclusion of the full-line forcing count in the special interrogatories to the jury was improper, since the count had been dismissed by the judge during the trial.

5. The charge was inadequate to guide the jury in properly applying the relevant law to the facts of the case.

6. The award of counsel fees was excessive and a proper predicate for such fees was not set forth.

In response, Pitchford contends that we should sustain the judgment based on the jury's verdict and uphold the award of attorney's fees.

We affirm in part, reverse in part, vacate in part, and remand.

## II. Mr. Pitchford's Standing to Sue.

At trial Mr. Pitchford claimed that he was entitled to damages, because of income that he had lost as a result of the various restraints by PEI on Pitchford Scientific. Mr. Pitchford also sought to recover the salary he lost as president of another firm, not a party to this action, Pitchford Manufacturing. It was alleged that from 1962 to 1968 PEI obstructed the development by Pitchford Manufacturing of Portaspec, a product Mr. Pitchford was eager to place on the market. In addition to the award to Pitchford Scientific, the jury awarded $72,000 to Mr. Pitchford for his personal claims.

On appeal, Mr. Pitchford contends that, even without considering the Portaspec issue, he would be justified in recovering an amount "at least equal to his average annual earnings of $57,000 per year between 1967 and 1970." Mr. Pitchford does not point to anything in the record to justify this particular measure of damages.

PEI, however, asserts that Mr. Pitchford had no standing to sue and that, consequently, the jury award to Mr. Pitchford as an individual was improper. Since the record



indicates that PEI's business was conducted with Pitchford Scientific and not with Mr. Pitchford personally, any injury under the alleged violations, PEI argues, was suffered by that corporation alone.

There is no proof that any of the restraints were directed against Mr. Pitchford individually as a shareholder or as an officer of either Pitchford Scientific or Pitchford Manufacturing. Consequently, any harm to Mr. Pitchford would have to flow derivatively from injuries done the companies of which he was a shareholder and an officer.[5]

This Court has adopted the precept that "the language [in section 4 of the Clayton Act] does not include indirect harm that the individual may [have suffered] as a stockholder through injury inflicted upon the corporation."[6] As this Court noted as early as 1910:

> Certainly it is not apparent that [the Sherman Act] was intended to or did confer upon hundreds of thousands of stockholders individual rights of action when the wrongs could have been equally well and more economically be redressed by a single unit in the name of the corporation.[7]

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[5] Even if standing to sue were not questioned here, the record does not appear to contain evidence sufficient to show that PEI's alleged exclusive dealing practices obstructed the development of Portaspec during the damage period. Indeed, Mr. Pitchford conceded that early in George Crosby's tenure as General Manager of PEI, which began in 1966, PEI approved the development of Portaspec.

[6] *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 732-34 (3d Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1190, 28 L.Ed.2d 323 (1971); *Ash* v. *International Bus. Mach. Corp.*, 353 F.2d 491 (3d Cir. 1965), *cert. denied*, 384 U.S. 927, 86 S.Ct. 1446, 16 L.Ed. 2d 531 (1966).

[7] *Loeb* v. *Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910).

Hence, Mr. Pitchford in his capacity as shareholder is without standing.

A denial of standing applies with equal force to Mr. Pitchford in his status as an officer of Pitchford Scientific.[8] Mr. Pitchford alleged that his salary as president of the firm was less than it would have been had the firm been able to market electronic instruments free of the restrictions imposed by PEI. Mr. Pitchford cannot, however, obtain standing merely by shifting profit from his shareholder pocket to his officer pocket.

Moreover, salaries of corporate officers are not necessarily tied to corporate profits; other factors may weigh in the balance. To permit suits by officers for salaries lost in consequence of antitrust violations on the basis of facts such as were presented here would open the door to conjectural damage claims. Mere assertion of a relation between a corporation's losses and its officers' salaries without more does not provide the foundation necessary to establish standing to sue. If his salary as president is not simply the reverse side of his earnings as principal shareholder of the company, any reduction in his salary attributable to PEI's practices is too far removed along the causal chain to entitle Mr. Pitchford to standing.

The same reasoning applies to Mr. Pitchford's standing as an officer of Pitchford Manufacturing. While the corporation might have a cause of action on the basis of the facts alleged here, the corporation's president can have no standing to sue in these circumstances.

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[8] *See Vermilion Foam Products* v. *General Electric Co.*, 386 F. Supp. 255 (E.D.Mich. 1974) (dictum). *Cf. Harrison* v. *Paramount Pictures, Inc.*, 115 F.Supp. 312, 316 (E.D.Pa. 1953), *aff'd per curiam,* 211 F.2d 405 (3d Cir. 1954).



Accordingly, based on the facts present in this suit, Mr. Pitchford is without standing to sue as an individual, and all portions of the judgment granting recovery to Mr. Pitchford personally must be reversed.

### III. Pricing Policy.

PEI's pricing policy was formulated by a committee consisting of its director of marketing, its chief financial officer, and its general manager. The committee promulgated a price list for sales of PEI's product to the public by its dealers and company-owned branch outlets, and a code indicating a discount at which the dealers could purchase the equipment from PEI. If, for a particular transaction, a dealer considered that the specified discount was not sufficient to make the sale profitable, the dealer could request a sales allowance beyond the normal discount.

Publishing list prices and establishing a program under which dealers may obtain extra discount, PEI argues, is perfectly proper. Mr. Pitchford, however, testified that PEI not only issued a suggested list price, but also exercised extensive control over prices. Any variance by a dealer from the list price, Mr. Pitchford stated, required approval by the pricing committee. Mr. Pitchford's testimony was supported by a PEI document, mailed to dealers and branches in 1969, which stated that any deviation by the dealer from the list price was to be approved by at least one member of the pricing committee.

There was evidence that PEI enforced its pricing policy. In connection with a sale to the Magee-Women's Hospital in 1969, Pitchford requested permission to sell below PEI's listed price. According to Mr. Pitchford, PEI's director of marketing, Robert Deichert, was "very emphatic that under

no circumstances could [Pitchford] cut the price." Deichert finally agreed that Pitchford would sell at list, and then make a separate grant to the hospital. PEI proceeded quietly to pay Pitchford a portion of the grant. Although Pitchford was not permitted to sell a line of Pye Unicam equipment at less than list price, a subsequent sale of such equipment to the Magee-Women's Hospital was consummated when Pitchford agreed to supply the hospital certain spare parts at no cost.

Sufficient evidence was presented to support a finding by the jury that PEI's pricing policies constituted a violation of section 1 of the Sherman Act. If there is no applicable fair trade legislation, resale price maintenance is *per se* illegal.[9] The only way a supplier such as PEI may permissibly influence resale prices is by an announcement of its preferred retail pricing policy. A supplier may not go beyond such an announcement to control the retail pricing practices of those to whom it passes dominion and control over its goods.[10]

The memorandum defining the role of PEI's pricing committee indicates that the committee's purpose was not only to supervise branch sale prices but to supervise dealer sale prices as well. The pricing committee policed both branch and dealer practices in the same manner, and PEI's intention with respect to the Magee-Women's Hospital sales

[9] *Kiefer-Stewart Company* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1950). There is no evidence in the record that PEI's equipment came under any fair trade legislation.

[10] *United States* v. *Parke Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); Von Kalinowski, Antitrust Laws and Trade Regulation § 67.02(2) (1972).



could reasonably have been perceived to be that any Pitchford price concession not undermine PEI's list price policy. Accordingly, there was enough evidence for the jury to find the intent requisite to the antitrust violation.[11]

A plaintiff, however, must demonstrate both that the antitrust laws were violated and that it has suffered "fact of damage" in consequence of that violation in order to establish a cause of action in a private antitrust suit.[12] There is not enough evidence here to sustain the jury's finding that during the four-year statutory damage period[13] there was damage from such a violation.

As the Supreme Court stated in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, "the burden of proving fact of damage under section § 4 of the Clayton Act is satisfied by proof of some damage flowing from the unlawful conspiracy . . . ." [14] It would have been sufficient if the wrongful acts had a tendency to injure Pitchford's business and if there had been introduced evidence of a decline in the value of Pitchford's profits that was not shown to be attributable to causes other than the antitrust violation. Pitchford, however, conformed to PEI's policies and there was no evidence relating the termination of the Pitchford dealership to any price-fixing plan of PEI. Nor was there

[11] *Compare Rea* v. *Ford Motor Co.*, 497 F.2d 577, 590 (3d Cir.), *cert. denied*, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 106 (1974).

[12] *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 113-14, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); *Rea* v. *Ford Motor Co.*, 497 F.2d at 589.

[13] 15 U.S.C. § 15b (1970). In the present case this period began on December 24, 1966 and ended on December 24, 1970.

[14] 395 U.S. at 114 n. 9, 89 S.Ct. at 1571.

sufficient evidence that Pitchford lost net profits because of PEI's pricing policies.

Accordingly, Pitchford failed to sustain its burden of proving fact of damage with respect to the price-fixing cause of action, and the trial judge improperly denied PEI's motion for judgment notwithstanding the verdict on this count.

### IV. Exclusive Dealing.

Although there is evidence that Pitchford lost sales prior to the damage period as a result of PEI's exclusive dealing practices, the evidence of injury to Pitchford in this respect during the damage period is ambiguous at best.

The most critical evidence in this regard is the following: Chester Robards, a Cleveland PEI dealer who was terminated, testified that he had been told sometime after 1967 that PEI was beginning to carry a line of equipment that would compete with a line he already carried, and that he was advised by PEI to give up the competing line. In June 1969, PEI executed a dealership agreement with VWR, PEI's West Coast dealer, providing that the handling of competing lines by VWR during the period of the agreement would be ground for termination. Also, Pitchford introduced a deposition of John O'Connor, director of marketing at PEI until 1968; O'Connor indicated that PEI had no policy with respect to its dealers representing companies aside from PEI, "other than the obvious conflict of interest type understandings . . . we wouldn't tolerate them representing a competitor." Thus, there is evidence that the policy of not permitting PEI dealers to represent a competitor was in effect for at least a portion of the damage period.



A memorandum dated November 1969, from George Crosby, the General Manager of PEI, to Robert Cavanaugh, the Vice President of PEI, concerning Pitchford's handling of a medical line supplied by another division of NAP. Crosby wrote:

> While our dealers are independent businessmen . . ., the facts are that they are essentially salesmen with one year contracts and we should demand the same performance from them that we do from our own sales force. I would fire one of my own salesmen if he casually announced that he were distributing other product lines, but in the past we have assumed there is nothing wrong with a dealer announcing to us that he now represents other companies (e.g., Pitchford taking on the medical x-ray line). I have told our dealers [we] don't care how they run their business, as long as their performance continues to be acceptable for PEI . . . but when performance deteriorates, we feel an obligation to get into the details of their activities just as we do in the case of a PEI salesman with a deteriorating performance. . . . It is very obvious that Arthur wants us to get off his back . . . I doubt very much that this latest flareup will result in our terminating Arthur Pitchford as a dealer but I would like to make known to him that the decision to terminate the dealer-relationship . . . is based upon poor performance.

There was no direct evidence that PEI enforced an exclusive dealing policy that prevented Pitchford from taking on competing lines of equipment during the damage period. The Crosby-Cavanaugh memorandum indicates

merely that Crosby had a predilection to treat dealers in a fashion similar to branch salesmen. Pitchford's evidence about opportunities relinquished prior to the damage period is useful to establish a pattern of violation. There is some validity to Pitchford's argument that PEI's attitude about exclusive dealing prior to the damage period and its exclusive dealing approach to other dealers made it clear to Pitchford that the assumption of competing lines was futile.[15]

The evidence of injury to Pitchford because of PEI's alleged policy of exclusive dealing was, however, insufficient. Indeed, Mr. Pitchford testified that he could not cite any examples of sales that were missed because of exclusive dealing practices by PEI during the damage period.

Pitchford's failure to prove any lost opportunity within the damage period is fatal to its claim on this count, because a plaintiff may not succeed in a private antitrust cause of action unless it shows fact of damage.[16]

### V. Full-Line Forcing.

Mr. Pitchford testified that during the damage period his organization was coerced into taking on the Pye Unicam line and the Torr X-Ray unit. He stated that, because of its poor quality and lack of profitability, he did not want to sell the Pye Unicam items. Two other employees of Pitchford also testified to the reluctance of Pitchford to distribute the Pye Unicam line. However, Mr. Pitchford stated that he was "afraid not to take on the line" for fear of cancellation of his dealership agreement.

[15] Pitchford did not show the mischief that any PEI exclusive dealing practices might inflict on commerce. PEI accounted for 25 to 40 per cent of the total United States market in each of its product lines and thus occupied a powerful economic position, but there was no evidence about which lines of commerce were substantially affected by Pitchford's inability to handle them. Under section 3 of the Clayton Act, exclusive dealing arrangements are illegal only if they foreclose competition in a substantial share of a line of commerce. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961).

[16] *See* note 12 *supra* and accompanying text.



To demonstrate injury by the forcing of the Pye Unicam products, Pitchford introduced evidence that it spent $15,814 for the initial equipment, approximately $1,400 for a trailer to haul the equipment, and $5,000 to pull the trailer. Pitchford also adduced testimony that it needed a full-time salesman to sell Pye Unicam equipment in 1968, and that in 1969 time equivalent to that which one salesman would provide was expended marketing this item. The orders booked in a year by these efforts to sell the Pye Unicam equipment were approximately one-seventh of those of an average Pitchford salesman.

The Torr unit was also undesirable, according to Mr. Pitchford, because he felt a competitor of PEI made a better, lower-priced X-ray. Roberts testified that all PEI dealers were informed that "they were expected to buy one of [the Torr units]." Presumably the purchase of a demonstration unit was preparatory to marketing the unit for PEI.

Full-line forcing is a violation of the antitrust laws only if the effect of such forcing "may be to substantially lessen competition . . . in any line of commerce." [17] In order to establish such a transgression, it must be shown that the seller had economic power in the market for the

[17] 15 U.S.C. § 14 (1970).

forcing item and that a substantial amount of commerce relating to the forced item was foreclosed.[18]

In *Fortner Enterprises, Inc.* v. *U. S. Steel Corp.*, a tying case, the Supreme Court indicated that the seller's economic power need not be a "monopoly or even a dominant position" in the market for the tying or forcing product; economic power would be sufficient for proof of a violation if the seller imposed the restraint "with respect to any appreciable number of buyers . . ." [19] With regard to the amount of commerce in the forced product that must be foreclosed in order to prove a violation, the Court in *Fortner* decided that $200,000 was not an "insubstantial" amount of commerce.[20]

Although Pitchford produced evidence of forcing by PEI with regard to the Pye Unicam and Torr equipment and although Pitchford's expenditures in connection with this equipment constitute the necessary fact of damage, Pitchford adduced no evidence that PEI's full-line forcing practices had any substantial effect on competition in any line of commerce. Regardless of the manufacturer's economic power, there can be no liability under a full-line forcing count absent a showing of foreclosure of competition in a substantial amount of commerce under the rule in *Northern Pacific*.

The trial judge appears to have agreed with this evaluation of the evidence, because near the conclusion of the

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[18] *See Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); *Fortner Enterprises, Inc.* v. *U. S. Steel Corp.*, 394 U.S. 495, 498-99, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969).

[19] 394 U.S. at 502-04, 89 S.Ct. at 1259.

[20] *Id.* at 502, 89 S.Ct.. at 1252.



trial he granted PEI's motion for a dismissal of this cause of action. Nonetheless the full-line forcing issue was included in the special interrogatories to the jury,[21] which returned a verdict that may have been based in part on this count. Since there had been a failure to prove an essential element of this claim, however, there was no foundation for submission of the question to the jury.

Accordingly, that portion of the judgment based on the jury's verdict with respect to full-line forcing will be reversed.

## VI. Territorial Restrictions.

### A. *Factual Background.*

PEI chose Pitchford in 1945 to be its first dealer in the United States. Pitchford's office was in Pittsburgh, Pennsylvania, but PEI originally authorized Pitchford to sell anywhere in the United States. Beginning in 1955, however, territorial clauses were inserted in Pitchford's annual dealership agreements. These clauses explicitly precluded Pitchford from selling outside the specified territory. PEI agreed not to assign more dealers to the designated territory, but it reserved the right to deal directly with federal and state governments and national business accounts

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[21] The full-line forcing count was left in an ambiguous procedural status. After the court "tentatively [sustained]" PEI's motion to dismiss the full-line forcing count, a notation that the count had been dismissed was entered in the docket. Nonetheless, the full-line forcing count was submitted to the jury in special interrogatories and in the judge's charge to the jury, despite the docket entry and despite references by the trial judge and Pitchford's counsel during the discussion of the jury charge indicating that it was understood that the full-line forcing count had been dropped. Because we reverse the judgment based on the full-line forcing count on its merits, it is unnecessary to decide the procedural questions surrounding this count.

within the assigned territory. Pitchford was to receive full commission credit for sales by PEI to such government or business accounts. Over a period of time, Pitchford's territory was steadily reduced by PEI, despite attempts by Pitchford to have it enlarged.

In the late 1960's, PEI re-evaluated its distribution system and gradually replaced dealerships in particular territories with branches; these branches were part of the PEI organization. As a result, dealerships in the District of Columbia, Ohio, Illinois, and California were eliminated. Pitchford was terminated in 1970, and by the conclusion of the trial there were only two PEI dealerships remaining in the country.[22]

Under PEI's policy, sales by a dealer outside its territory diverted at least a portion of the sales commission to the dealership or branch that had jurisdiction over the area where the buyer was located. PEI intervened at the behest of various dealerships and branches to settle disputes over commissions and territories.

In addition, there appear in the record instances of the enforcement, just prior to and during the damage period, of PEI's policy to discourage all extraterritorial sales. Thus, Robards, president of the Cleveland dealership that was terminated, testified to a telegram sent by PEI approximately eight months prior to the beginning of the damage period. The telegram concerned the installation by Robards of equipment outside his territory:

> It is against Philips policy to have dealers contact prospects in other dealer territories without prior

[22] Testimony that the move to direct branch selling is an industrywide trend was uncontradicted.



> notification to dealer involved. . . . It is directly opposed to the Philips dealer franchise to accept orders for equipment to be installed in other dealer territories. . . . As a result full dealer discount and quota credit involved in aforementioned [sale] . . . will be assigned to . . . the [dealer in territory where buyer is located].

Pitchford contended that PEI's policy to discourage sales by a dealer outside its territory continued during the damage period.[23] In this regard, Pitchford introduced a letter sent by PEI in January, 1967 that threatened to terminate Robards' dealership because of sales made by Robards outside his territory.

A controversy erupted in 1969 between a branch salesman of PEI and VWR Scientific, the PEI West Coast dealer, over their competition for a sale of Pye Unicam equipment to a Texas college. The salesman's complaint prompted a letter from the sales manager, G. L. Dienes, to VWR:

> Phelan states he increasingly is running into [VWR] sales activity [in his territory]. . . .
> I am also attaching recent correspondence from Pye Unicam alleging [VWR] trying for Unicam business in Taiwan. Ted, this extra-curricular activity on the part of your sale representatives speaks well for their aggressiveness. *However, I would appreciate it if you would investigate these two situations and let me know what plans you have for eliminating this intercompetition in the future.* (emphasis supplied)

[23] *See* note 13 *supra*.

Deichert, PEI's director of marketing, received a copy of the Dienes letter, but raised no objection to the sentiments expressed in it.

In 1971, Dienes' successor sent another letter to VWR Scientific, questioning a sale by VWR in North Dakota, an area assigned to PEI's Chicago branch. A copy of this inquiry also passed over the desk of PEI's director of marketing without comment or correction.

Further, there is evidence that, in cases where a prospective customer asked for bids from various PEI dealerships in order to obtain the best price, PEI encouraged the dealers outside the territory of the customer to quote prices higher than the home dealer. A request for bids from an Hawaiian hospital was forwarded by PEI to its dealers around the country with this suggestive paragraph attached:

> [VWR, the home dealers] have been in continuing contact with [the hospital] and, of course are in a position to provide service in Hawaii. *We assume that other dealer organizations will be forced to quote additional monies for the travel expenses associated with installation of* [the equipment] *in the islands.* This is, of course, a matter of personal concern for individual dealer offices. (emphasis supplied.)

The evidence of enforcement of territoral restrictions against Pitchford itself during the damage period is wholly circumstantial. In 1964, however, prior to the damage period, Pitchford was denied the commission on an order by a U.S. Steel plant in Gary, Indiana, which was outside Pitchford's territory. Evidence was presented about several other potential sales by Pitchford that were all



thwarted by PEI's territorial policies, but these potential sales also appear to have arisen prior to the damage period.

Nonetheless, Pitchford claims that the Robards and VWR experiences reflected a continuing territorial allocation program by PEI. The President and General Manager of PEI, George Crosby, testified that the advent of his tenure in 1966 saw no change in PEI's territorial policies. Thus, urges Pitchford, the evidence supports the inference that the policies that prevented the Pitchford sales prior to the commencement of the damage period were still in force during the damage period.

PEI, however, insists that its territorial arrangement is reasonable, and exists primarily to assure proper installation and maintenance of its sophisticated and "hazardous" product. It asserts that no violation could be possible under the territorial restriction count "because of the critical importance of service and installation in the ability to successfully conduct business." Indeed, PEI maintains that Pitchford sustained a benefit from the territorial policy because Pitchford was under no compulsion from PEI to overextend its "meager" service staff by selling beyond its territory. PEI claims that the territorial limitation was so in keeping with Pitchford's capabilities that "in the last four or five years of its distributorship, 'Pitchford never made' any real efforts to make sales outside its territory." Finally, PEI contends that the Pitchford dealership profited from the territorial system because direct sales by PEI into the Pitchford territory generated full commissions for Pitchford, amounting to 21 per cent of its sales in 1969.

B. *Violation.*

In *United States* v. *Arnold Schwinn & Co.,* a manufacturer's practice of restricting its dealers to sales in prescribed territories was held to constitute a vertical restraint and a *per se* violation of the Sherman Act.[24] The *Schwinn* rule forbids a manufacturer from enforcing restraints limiting a distributor's customers, either by geographic sales boundaries or otherwise, if the manufacturer has surrendered dominion and control over its product. Because there is evidence that Pitchford purchased PEI's goods for resale, the jury could properly have found that PEI had surrendered dominion and control to Pitchford.

Both prior to and during the damage period, PEI wrote to Robards, VWR, and other PEI dealers objecting to violations of PEI's territorial allocation. There was a termination threat to Robards during the damage period, at least partially attributable to his violation of PEI's territorial policy. PEI's termination of many dealers, its use of warnings to dealers, Pitchford's experience with PEI's territorial policy prior to the damage period, and the evidence that there was no change in PEI policy during the damage period, would enable a jury to find that PEI enforced its territorial policy during the damage period.

If a manufacturer cannot impose a vertical division of markets, neither can it police a division of markets for the benefit of horizontal competitors.[25] This Court in *American*

[24] 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967). *See United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 608, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); *Eastex Aviation, Inc.* v. *Sperry & Hutchinson Co.,* 522 F.2d 1299 (5th Cir. 1975).

[25] *United States* v. *Topco Associates,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.,* 521 F.2d 1230 (3d Cir. 1975). *See also Anderson* v. *American Automotive Assoc.,* 454 F.2d 1240, 1244, 1246 (9th Cir. 1972).



*Motor Inns, Inc.* v. *Holiday Inns,* held that a chain of motels could not permissibly enforce territorial entry restrictions which gave existing franchisees a veto over the entry of any new franchises nearby.

In the present case, there is evidence that PEI responded to branch and dealer complaints about sales made without regard to the territorial allocation and actively sought to prevent entry by one dealer into another dealer's territory. If an extra-territorial sale was consummated, the selling branch or dealer had to surrender all or a portion of its commission to the branch or dealer having jurisdiction over the customer's place of business. In addition, the record reveals an explicit agreement between PEI and each dealer to divide territories. Thus, a horizontal restraint, a *per se* violation of the Sherman Act, could be found on this record, even if the *Schwinn* prohibition of vertical restraints were not dispositive.

PEI seeks to avoid the impact of the *per se* rule against vertical and horizontal restraints by arguing, first, that the facts of this case show only a vertical restraint and second, that, because of the circumstances here, a court must apply a rule of reason analysis similar to that employed in *Tripoli Co.* v. *Wella Corp.*[26] In *Tripoli* this Court applied a rule of reason approach to limitations on distributor sales because the restrictions there were found necessary to prevent injury to inexpert users of professional hair care solutions. PEI argues that the restraints here were essential to assure customers of adequate service by the dealer who had sold them the instruments. But, unlike the situation in *Tripoli,* PEI has not offered any evidence to show

[26] 425 F.2d 932 (3d Cir. 1970).

that if PEI's territorial restraints were removed there would have been a danger of public injury similar to that suggested in *Tripoli*.

Nor does PEI, as it contends, come within the exception to the *per se* prohibitions found in *United States* v. *Jerrold Electronic Corp.*[27] In *Jerrold,* Judge Van Dusen, then a district court judge, found an exception to the *per se* rule prohibiting the tying of products and services when such tying is essential to the introduction of a new product under conditions of technological uncertainty. Judge Van Dusen characterized that case as a "rather unique situation." [28] In this case, which involved territorial restrictions rather than a product-service tying arrangement, PEI alleged that Pitchford was not providing adequate service. There was no evidence, however, that the territorial restraints employed by PEI were necessary to the initial success or failure of an industry with an uncertain and developing technology. Even assuming that the *Jerrold* exception applies equally to product-service tying and territorial limitations, no evidence was produced to sanction an exception to the *per se* rule in this case.

Here there is evidence of territorial restrictions imposed by the manufacturer, there is no basis for employing a rule of reason analysis, and the case does not fall within an exception to the general rule prohibiting territorial restraints by a manufacturer. Accordingly, the jury could

[27] 187 F.Supp. 545 (E.D.Pa. 1960), *aff'd per curiam,* 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961).

[28] *See Copper Liquor, Inc.* v. *Adolph Coors,* 506 F.2d 934, 944 (1975) (quality control rationale for imposing vertical territorial restraints insufficient to allow exception to *per se* rule).



properly have found a violation of section 1 of the Sherman Act.

C. *Fact of Damage.*

In order to establish a cause of action for territorial restrictions, it must be demonstrated that there was an antitrust infraction and that the plaintiff has suffered "fact of damage" in consequence of that infraction.[29] Hence, Pitchford must show with "reasonable certainty" some injury to the dealership in consequence of the territorial restrictions imposed by PEI.[30]

PEI is correct in noting that there was no presentation of a specific instance during the damage period when Pitchford lost sales or profits because of PEI's territorial policy. Pitchford introduced evidence, however, that (1) PEI was enforcing its territorial policy prior to and during the damage period, requiring commission reduction for extra-territorial sales and threatening the termination of at least one dealership because of violation of the policy; (2) Pitchford was denied three sale possibilities prior to the damage period because of PEI's territorial policies; (3) during the damage period Pitchford was required to sign an agreement with explicit territorial restrictions in order to continue its dealership; (4) Pitchford had the

[29] *Rea* v. *Ford Motor Co.,* 497 F.2d 577, 589 (3d Cir.), *cert. denied,* 419 U.S. 868, 92 S.Ct. 126, 42 L.Ed.2d 106 (1974).

[30] *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.,* 269 F.2d 950, 958 (10th Cir. 1959), *cert. denied,* 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960). *See Story Parchment* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 562, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Deaktor* v. *Fox Grocery Co.,* 475 F.2d 1112, 1116-17 (3d Cir. 1973).

capability during the damage period to make sales beyond its assigned territory; and (5) from 1960 and into the damage period Pitchford had unsuccessfully attempted to have its territory expanded.

In addition, Pitchford produced witnesses and exhibits to show that, had it been permitted to compete in an expanded territory, it would have made additional sales, even considering competition from other PEI branches and dealers. After accounting for the costs and taxes that would necessarily accompany such an increased gross revenue, Pitchford would still have made an additional profit from the lost sales, according to the calculations of its witness.

This evidence was more than mere conjecture.[31] The jury might reasonably have concluded that PEI's policy of restricting dealers to limited territories had been applied directly to Pitchford during the damage period when PEI denied Pitchford's request that its territory be expanded. The jury might also have reasonably concluded that being confined to an assigned territory caused Pitchford to lose sales it might otherwise have made.

It is not sufficient to show fact of damage by mere speculation or guesswork. But, in the circumstances of this case, it would be unduly harsh to require Pitchford to document each sale that it might have made had it contravened the PEI territorial policy and attempted to do business outside its restricted territory during the damage period. The jury could have credited the expert testimony adduced by Pitchford and could have found that Pitchford lost some profits by virtue of the loss of sales

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[31] *Compare Deaktor* v. *Fox Grocery Co.,* 475 F.2d at 1116-17.



attributable to the territorial restrictions imposed on it by PEI.

Thus, it would have been inappropriate for the trial court to grant PEI's motion for a judgment n.o.v. with respect to the territorial restriction count. The disposition of this count, however, depends upon the resolution of PEI's assertions respecting trial error.

## VII. Trial Errors.

PEI raises a number of claims regarding conduct during the trial, the opening and closing arguments of counsel for Pitchford, and the charge to the jury. It was urged that these errors require that any portion of the case which survives PEI's motion for a judgment n.o.v. be reversed and remanded for a new trial. Therefore, these contentions would apply only with respect to liability for the territorial restriction cause of action, since all other issues of liability have been decided in favor of PEI, and since, as will appear below, the matter of damages must be remanded in any event.

The errors to which PEI objects fall into three categories. The first group concerns evidence. PEI alleges that testimony regarding activities in the 1940's and 1950's, substantially before the damage period, was irrelevant and likely to be confusing to the jury. This same objection is also made to evidence regarding the relations between PEI and various European corporations. In addition, Pitchford is alleged to have elicited hearsay and improper opinion testimony about the territorial restrictions on the dealership.

Arguments by Pitchford's counsel at the opening and close of the case are the basis for the second class of

objections by PEI. PEI avers that these arguments were prejudicial by reason of misstatements of fact, misstatements of law, reliance on matters not of record, allusions to nonproduction of witnesses despite the fact that the deposition testimony of such witnesses had been admitted into evidence, and appeals to passion. PEI is particularly concerned by a reference that compared PEI officials with Germans during the Nazi period, and by repeated employment of the image of small dealers beset by the unspecified nefarious practices of American industry.

The final class of objections relates to the charge to the jury. PEI contends that the instruction on territorial restrictions was erroneous and inadequate because it confused horizontal and vertical restraints and because it failed to consider all the elements of the offense. In addition, the charge is said to be incorrect since the jury was told that it could draw inferences from the non-production of evidence without instruction about witnesses whose testimony had been introduced by deposition. The charge also misled the jury by improperly comparing the antitrust laws to the tort of negligence and, PEI asserts, prejudiced the jury by a statement that "there is a strong human temptation to yield to the desires for profits" which often leads businessmen to "practices that happen to be illegal."

Although it goes without saying that great care must be exercised to assure that prejudicial and confusing evidence be eliminated or kept to a minimum, we cannot say that the admission of the evidence protested here rises to the level of reversible error. In a case of this nature, it is not irrelevant for the plaintiff to introduce evidence regarding the historic development of the alleged violations, although the plaintiff must show, of course, that there was a violation of the law within the statutory damage period. So far as the territorial restriction count is concerned, the evidence implicating PEI's European connections was included only incidentally in the context of evidence apposite to PEI's termination of the Pitchford dealership. The objections to hearsay and opinion evidence relating to the same count, although not lacking in merit, do not require reversal in the circumstances of this case. The evidence in question tended to reinforce Mr. Pitchford's testimony, but because his testimony was also corroborated in other ways the hearsay and opinion testimony may be regarded as primarily cumulative. In a long and complex case, such error does not constitute grounds for ordering a new trial.[32]

The opening and closing remarks by Pitchford's counsel may have from time to time approached the margins of impropriety. However, with respect to the territorial restriction count in particular, there are no improper references in the arguments that would merit the declaration of a mistrial. The general tone of the opening and closing arguments and the specific references to "Germany in 1941" and to "corporations that treat the law with utter and complete disrespect and disregard . . ." were immediately qualified with statements to the effect that "this is a far less heinous crime [than the attitude that prevailed in Germany in 1941], and I don't mean to imply in any way that they are comparable . . ." and "the great bulk of [corporations] do everything they can to abide by the



[32] *See United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189, 65 S.Ct. 254, 89 L.Ed. 160 (1944); *Gerhart* v. *Henry Disston and Sons, Inc.*, 290 F.2d 778, 786 (3d Cir. 1961).

law. . . ." References to the criminal aspects of the antitrust laws were qualified by statements that the present case was a civil one.

Counsel ought not invoke horrors such as Nazi Germany, indulge in a polemic about large corporations generally when the issue is the behavior of one particular manufacturer, or allude in a civil suit to criminal laws that are in no way implicated in that action. We cannot say, however, that the arguments here, given their ambience, actually crossed the bounds of the impermissible.[33]

Nor does the charge to the jury require a reversal and remand for a new trial on the issue of liability with regard to the territorial restriction issue. Although the instructions regarding territorial restraints were not as adequately detailed as they might have been, these errors do not appear to be critical. This is so because of our determination that liability for a per se violation could be found in this case on either a vertical restraint theory or a horizontal restraint theory.[34]

The charge relating to the non-production of evidence was not unfair. Considered in its context, the charge would not suggest to the jurors that the failure to produce witnesses in person when their depositions had been offered in evidence is a foundation for an adverse inference. PEI cannot be said to have been prejudiced by the instruction on this matter.

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[33] *But compare Foster* v. *Crawford Shipping Co.*, 496 F.2d 788 (3d Cir. 1974); *Robinson* v. *Pennsylvania Railroad Co.*, 214 F.2d 798 (3d Cir. 1954).

[34] *See* F.R.Civ.P. 61. *Cf. Williams* v. *Independent News Co.*, 485 F.2d 1099, 1106 (3d Cir. 1973).



Comparing antitrust law to negligence, while misleading, was not significant when the entire charge is considered, as it must be. The reference to "the strong human temptation to yield to the desires for profit" was included in a prolonged digression on the origins of the antitrust laws, and was not aimed with particularity at the defendants. In these circumstances it does not appear that this comment would unduly prejudice the jury.

Thus, there is no basis for granting a new trial with respect to the territorial restriction count. In view of this determination and the previous conclusion that it would be inappropriate to grant a judgment n. o. v. with respect to this count, the portion of the judgment based on the jury's finding of an antitrust violation and fact of damage under the territoriality count will be affirmed.

### VIII. Measure of Damages.

The jury found losses to Pitchford Scientific of $550,000 and $203,000—each amount being predicated on multiple violations of the antitrust laws. The special interrogatories did not require the jury to specify the amount of damages attributable to each violation. Because of our resolution that, as a matter of law, no liability was proved on the counts relating to price fixing, exclusive dealing, and full-line forcing, the question of damages in this case must be remanded for reconsideration. The only count on which the finding of liability has been affirmed is the territorial restriction count, and on remand damages solely with respect to that issue must be ascertained.

PEI, however, makes several objections to the methods of calculation of damages that were employed at the first trial. A number of these objections are relevant to the

determination of damages stemming from the territorial restrictions, and we shall consider them in order that error may be avoided when damages are reconsidered on remand.

Pitchford attempted to estimate the additional profits it would have gained from an expanded territory, had it not been for the restriction and ultimate termination of its dealership. Pitchford's expert began by calculating Pitchford's share of all PEI sales in the United States. This figure was then applied to PEI orders-booked and sales in the expanded territory, including the states adjacent to Pitchford's restricted territory. An adjustment was made to account for competition from other PEI outlets in the projected area. The resultant figure was said to represent Pitchford's likely sales in the enlarged territory. From this hypothetical sales figure, the profits lost by Pitchford were computed.

PEI objects to this projection for two reasons. Initially, PEI contends that the expert's expansion of Pitchford's old territory was without foundation in the record. Instead, Pitchford's expert arbitrarily enlarged the territory to include all states adjacent to Pitchford's assigned territory, although there were already several PEI branches and dealers in such states, and insufficient account was taken of the expanded staff that Pitchford would need to maintain its share of PEI sales in a larger territory.

Second, the calculation for the expanded territory produced a total profit for Pitchford sales in both its actual territory and in the hypothetical additional territory. According to PEI, the failure to deduct Pitchford's actual sales for the years 1967-1970 results in an overstated estimate of Pitchford's losses.

PEI also argues that in calculating incremental profits, Pitchford's experts used the sales and orders-booked fig-



ures inconsistently from year to year, that one of the orders-booked figures was grossly inaccurate, and that the figures used to compute Pitchford's lost profits are not representative of Pitchford's overall costs.

The next group of contentions focuses on the value of Pitchford Scientific at its termination. PEI asserts that there was no damage in fact to the going-concern value of the Pitchford dealership because termination by PEI did nothing to undermine the goodwill of the dealership which might have been continued by Pitchford with alternative product lines. Further, to the extent that goodwill was founded on dealing in PEI's equipment, any goodwill that Pitchford possessed must have been conditioned upon PEI's right to cancel under the annual dealership contract.

In this connection, PEI maintains that, even if Pitchford has been deprived of the goodwill value of its dealership, the calculation of the loss from that deprivation was incorrect. This is so because the salary of Mr. Pitchford was not included as a cost of operation of the dealership when potential earnings by Pitchford Scientific were projected. This omission artificially inflated earnings, it is contended, and resulted in an overstatement of projected profits. Moreover, PEI asserts that despite its objections the trial court permitted the use of calculations on the loss of going-concern value that were invalid for failure to exclude from such loss the assets retained by Pitchford at the termination of its PEI dealership. PEI objects also that there was no foundation for the capitalization rates used to compute the estimated going-concern value of the Pitchford dealership.[35]

[35] The capitalization rates employed in three exhibits introduced by Pitchford ranged between 10% and 20%.

PEI's final disagreement with the computation of post-termination damage is the use of the price paid for Pitchford's medical equipment business. The jury awarded Pitchford an amount that happened to be equal to the net value of its medical equipment business, as determined by its purchase agreement in 1972, in compensation for the termination of Pitchford's PEI dealership in 1970. PEI claims that the medical equipment business was not comparable to the dealership under consideration here, and that there is no evidence in the record that indicates any such similarity. Therefore, the value of the medical equipment business, maintains PEI, was irrelevant and misleading in estimating the value of the terminated dealership. More importantly, PEI charges that the valuation of the medical equipment business was grounded not on documents kept in the regular course of business, but on documents prepared *post litem motam.*

The contentions by PEI are not uniformly meritorious: PEI's challenge to Pitchford's expansion of its territory in the damage exhibit must fail. If the jury could reasonably have found that Pitchford was denied sales by virtue of PEI's territorial restrictions and that the dealership was terminated in connection with the illicit territorial policy of PEI, it could consider evidence estimating Pitchford's losses as a result of the PEI practices. There was evidence that Pitchford could have made sales beyond its territory; the extent of such hypothetical sales was necessarily an estimate. Whether the estimate of Pitchford's lost profits was overly generous—expanding Pitchford's territory beyond Pitchford's sales capacity—is a matter that concerns the weight of the evidence, not its admissibility. As such, it is a question for the jury to consider.

In addition, PEI's claim that no goodwill was lost by Pitchford because of termination is without basis in the



circumstances of this case. Pitchford could have built up substantial goodwill over the years while handling PEI products. That the annual dealership contract could be cancelled on thirty days' notice would not necessarily vitiate such goodwill and Pitchford, or its hypothetical purchaser, could have had a justifiable expectation that there would be no cancellation of the dealership in violation of the antitrust laws.

A number of PEI's arguments, however, have substance. In particular, a plaintiff cannot recover its loss more than once. The salary of Mr. Pitchford should have been treated as a cost of operation in the data employed to project potential earnings for the purpose of evaluating the lost going-concern value of Pitchford.[36] The failure to deduct Mr. Pitchford's salary as an expense of the dealership artificially inflated earnings and made the profit extrapolation inaccurate. The same principle applies as well to any assets retained by Pitchford after termination; these assets should have been subtracted from the estimate of value lost in consequence of termination. Similarly, Pitchford

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[36] *Eastman Kodak* v. *Southern Photo Co.*, 273 U.S. 359, 376, 47 S.Ct. 400, 71 L.Ed. 684 (1927); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1351 n. 20 (3d Cir. 1975); *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 886 (1st Cir. 1966); *Chiplets, Inc.* v. *June Dairy Products Co.*, 114 F.Supp. 129 (D.N.J. 1950) (patent abuse).

Assuming that Mr. Pitchford earned the salary by the contribution of services necessary to the dealership's operations, anyone purchasing the dealership would have to expend an approximately equal amount to hire a replacement for Mr. Pitchford, and the earnings from ownership of the concern would have to be reduced by that much. If Mr. Pitchford did not contribute services equal in value to the "salary" he drew as president of the company, then he was not being paid a salary but was drawing a dividend due the owner.

may not recover, in the guise of estimated lost profits from hypothetical operations, profits that it had already earned within its accustomed territory.[37]

We do not decide the other issues raised by PEI with respect to damages, but on remand the district court should determine whether the medical supply business and the PEI dealership are reasonably comparable and, if they are, whether the profit figures of the Pitchford medical equipment business were based upon reasonably accurate business records. Only a similar business would provide a basis for a jury's consideration of damages on the termination count.[38]

In addition, every effort should be made to avoid inconsistent or inaccurate use of the sales and orders-booked figures. When considering the estimated, or *pro forma*, constructions of incremental sales from expanded territories, care should be taken that all reasonable costs of an expanded sales capacity are included and that competition from other PEI branches and dealers is properly weighed in the calculations.

### IX. The Award of Attorney's Fees.

Pitchford applied to the trial court for an award of an attorney's fee based on 3,270 hours devoted to the litigation

[37] *Albrecht* v. *Herald Co.*, 452 F.2d 124 (8th Cir. 1971), *rev'd on other grounds*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 421 F.2d 61, 62 (1st Cir. 1970).

[38] *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 421 F.2d 61, 82 (1st Cir. 1970); *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 69 F.Supp. 103, 109 (E.D.Pa. 1946), *aff'd*, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811, 68 S.Ct. 1016, 92 L.Ed. 1742 (1948).



by counsel and valued at $138,763.[39] Pitchford also sought expenses of $17,349. In a summary order the trial judge awarded $645,250 as an attorney's fee plus costs—over four times the sum set forth in Pitchford's application. In his order the trial judge cited *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*,[40] but did not adduce any explanation for the amount of the award.

The principles of *Lindy* are applicable to an award of attorney's fees pursuant to 15 U.S.C. § 15,[41] although *Lindy* itself involved an award under the equitable fund doctrine. The specific application of these principles in each case must be explained by the district court when it orders the award of attorney's fees. Because the explicit findings and analysis required by *Lindy* were not explicated, we are compelled to return the attorney's fee issue to the trial court.

When considering this issue on remand, the trial court should be guided by the standards set forth in *Lindy*. It must take into account (1) the hours expended by counsel which contributed to the recovery; (2) the reasonable value of counsel's time, usually counsel's normal hourly billing rates; (3) the 'contingent nature of success' in the action, and (4) the quality of the work performed. The judge's evaluation of the quality of the services is to be made in light of what he has been able to observe, the amount of the recovery and the complexity of the issues in the controversy.[42]

[39] *See* 15 U.S.C. § 15 (1970).

[40] 487 F.2d 161 (3d Cir. 1973).

[41] *NBO Industries* v. *Brunswick Corp.*, 523 F.2d 262, 279 (3d Cir. 1975). *See Merola* v. *Atlantic Richfield Co.*, 493 F.2d 292, 298 (3d Cir. 1974).

[42] 487 F.2d at 166-169.

The *Lindy* case involved a fee that was awarded from a fund which counsel had obtained for the benefit of a class. *Lindy* is, to that extent, different from the present suit, in which the award to Pitchford for the costs of its lawyers is to be paid by the defendant. An award from an equitable fund based on the "contingent nature of success" in the action would reflect somewhat the normal practice in contingency fee arrangements: Counsel is paid out of the damage award in a measure proportionate to the hazards of the case. Where attorneys are paid from an equitable fund or by a contingency fee the defendant does not bear the cost incurred by the plaintiff in proceeding with the action, but under section 15 the antitrust defendant may be required to pay an award for attorney's fees as well as an award for damages.

*Merola* v. *Atlantic Richfield Co.*[43] applied the *Lindy* principles to a situation like the one presented here, since in *Merola* there was a specific agreement that the attorney's fee was to be fixed by the court and paid by the defendant. The opinion of Chief Judge Seitz in *Merola II* is instructive with respect to the application of the "contingent nature of success" concept, set forth in *Lindy*, to cases where the losing defendant must pay a reasonable fee for plaintiff's cost of counsel.

This "contingent nature of success" factor, like the quality of work factor, is a consideration that provides the trial court with flexibility in its computation of the fee award.[44] The focus of the court's attention is to be the objective standard provided by the hours expended by counsel and the reasonable hourly rate of compensation for each attorney involved. The court may then justify deviation from the resultant figure if such is warranted by the success of the action despite a substantial likelihood of failure at the outset, or by the particularly high or low quality of counsel's work.

The contingency fee agreement entered into by plaintiff and its counsel is distinct from the "contingent nature of success" concept as employed in *Merola II*. It would seem to be a questionable policy under 15 U.S.C. § 15 for courts to enforce against a defendant whatever contingency fee arrangements have been entered into by a plaintiff and its counsel,[45] because such a policy might encourage unrealistic agreements and result in excessive counsel fees. The opinion in *Merola II* indicates that this Court has not adopted a policy lacking sensitivity to this problem.

If plaintiff and its counsel have made a prior agreement respecting a contingency fee that would not be completely satisfied by the award of a reasonable attorney's fee pursuant to section 15, the unsatisfied portion of the contingency fee could then be paid out of the award for damages that has been obtained. It would appear improper to require a defendant to bear whatever costs its opponent's private arrangement would impose. Under 15 U.S.C. § 15 the defendant may be obliged to pay only what the court determines to be a reasonable fee for the legal services provided to plaintiff in the case at issue.[46]

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[43] 493 F.2d 292 (3d Cir. 1974) (*Merola I*), *on appeal from the decision on remand*, 515 F.2d 165 (3d Cir. 1975) (*Merola II*).

[44] 515 F.2d at 168.

[45] In this case Pitchford and his counsel had a 25 per cent contingency fee arrangement.

[46] *See Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846, 859 (8th Cir.), *cert. denied*, 343 U.S. 942, 72 S.Ct. 1035, 96 L.Ed. 1348 (1952); *In re Gypsum Cases*, 386 F.Supp. 959, 984 (N.D.Cal. 1974); *Gossner* v. *Cache Valley Dairy Ass'n*, 307 F.Supp. 1090 (D.Utah 1970).

*Opinion of the United States Court of Appeals for the Third Circuit, December 24, 1975*

X. Conclusion.

The judgment of the district court will be affirmed in part, reversed in part, and vacated in part, as follows:

(a) That portion of the judgment based on the determination that Mr. Pitchford had standing will be reversed.

(b) That portion of the judgment based on the jury's verdict regarding the price fixing count will be reversed.

(c) That portion of the judgment based on the exclusive dealing verdict will be reversed.

(d) That portion of the judgment based on the full-line forcing verdict will be reversed.

(e) That portion of the judgment based on the jury's finding of an antitrust violation and fact of damage under the territoriality count will be affirmed.

(f) That portion of the judgment based on the jury's finding of amount of damage in connection with the territoriality count will be vacated and remanded for further consideration of damages.

(g) That portion of the judgment relating to the award of attorney's fee will be vacated and remanded for reconsideration and specific findings and analysis consonant with 15 U.S.C. § 15, *Lindy,* and the subsequent cases cited above.

The cause will be returned to the district court for further proceedings consistent with this opinion.



**Memorandum of the United States Court of Appeals for the Third Circuit Denying Petition to Recall the Mandate, June 28, 1977**

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 75-1136 and 75-1137

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Arthur H. Pitchford and Pitchford Scientific Instruments Corporation,

v.

PEPI, Inc. (Philips Electronic Instruments, Inc., North American Philips Corporation),

*Appellants.*

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Before:

Van Dusen, Adams and Hunter,
*Circuit Judges.*

MEMORANDUM SUR PETITION TO RECALL THE MANDATE

The defendants in this matter have petitioned this Court to recall its mandate, to stay the retrial in the district court on the issue of damages, and to set this case for reargument in order to determine whether the decision of the Supreme Court in Continental T.V., Inc. v. GTE Sylvania, Inc., 45 U.S.L.W. 4828 (June 23, 1977) is inconsistent with the opinion of this Court in this case. We have concluded that the petition should be denied.

*Memorandum of the United States Court of Appeals for the Third Circuit Denying Petition to Recall the Mandate, June 28, 1977*

If in fact the mandate of this Court is in conflict with a subsequent decision of the Supreme Court, the rule announced by the Supreme Court, rather than the mandate of this Court, will be the appropriate rule and should be followed by the district court. The controlling effect of the mandate from a higher to a lower court is an application of the law of the case doctrine, and that doctrine yields to the authority of a source of law higher than that of the court which issued the mandate. *See Banco Nacional de Cuba* v. *Sabbatino,* 383 F.2d 166 (2d Cir. 1967); *cert. denied,* 390 U.S. 956 (1968).

Thus, it is for the district court, in the first instance, to determine whether the Supreme Court's opinion in *GTE Sylvania* and our opinion in this matter are, indeed, inconsistent. Such a resolution is, of course, subject to an appeal to this Court at the appropriate time. We, therefore, express no opinion as to the resolution of such question at this time.

The petition to recall the mandate will be denied.

Dated: June 28, 1977



**Opinion of the United States District Court for the Western District of Pennsylvania, July 13, 1977**

UNITED STATES DISTRICT COURT

W. D. Pennsylvania

Civ. A. No. 70-1461

July 13, 1977

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Pitchford Scientific Instruments Corporation,

*Plaintiff,*

v.

PEPI, Inc., North American Philips Corporation, and Philips Electronic Instruments, Inc.,

*Defendants.*

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Opinion

Dumbauld, *District Judge*

Following a lump sum verdict of $825,000 for plaintiff in an antitrust triple damage suit under 15 U.S.C. §§ 1 and 15, the Court of Appeals concluded that damage to plaintiff arising from price-fixing, exclusive dealing, and full-line forcing had not been sufficiently proved, and remanded for further proceedings to determine the "amount of damage in connection with the territoriality count." *Pitchford* v. *Pepi,* 531 F.2d 92, 111 (C.A.3, 1976). See also *ibid.,* 101-105. The facts of the case are sufficiently stated in the thorough opinion of the Court of Appeals, and need not be repeated here, as we are now concerned only with a

question of law: namely, whether the opinion and mandate of the Court of Appeals are consistent with, or conflict with, the subsequent decision of the Supreme Court in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, —— U.S. ——, 97 S.Ct. 2549, 53 L.Ed.2d 568, decided June 23, 1977.[1]

Five days later, upon defendant's petition to recall the mandate and stay the retrial as to damages, the Court of Appeals denied the relief sought, holding that the District Court should make the initial determination with respect to the issue of inconsistency. The Court of Appeals said:

> If in fact the mandate of this Court is in conflict with a subsequent decision of the Supreme Court, the rule announced by the Supreme Court, rather than the mandate of this Court, will be the appropriate rule and should be followed by the district court. The controlling effect of the mandate from a higher to a lower court is an application of the law of the case doctrine, and that doctrine yields to the authority of a source of law higher than that of the court which issued the mandate. See *Banco Nacional de Cuba* v. *Sabbatino*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956, 88 S.Ct. 1038, 19 L.Ed.2d 1151 (1968).

Stated generally, the *Continental T.V.* case overruled *U.S.* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), and reverted to the standards of

[1] This decision affirmed *GTE Sylvania Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980 (C.A.9, 1976), in which the Ninth Circuit Court of Appeals utilized the unusual opportunity to reverse a retired Supreme Court Justice, the late Tom C. Clark, sitting by designation as the trial judge in the Northern District of California. *Ibid.*, 987.



*White Motor Co.* v. *U.S.*, 372 U.S. 253, 83 S.Ct., 696, 9 L.Ed.2d 738 (1963), where "the Court had refused to endorse a *per se* rule for vertical restrictions." [—— U.S. at ——, 97 S.Ct. at 2556]. The Court abandoned reliance upon the "witty diversities of the law of sales"[2] with respect to transfer of title as the criterion of whether to apply a *per se* rule, in favor of "demonstrable economic effect," with the result that both sale and non-sale transactions are to be judged under the "rule of reason" in case of non-price vertical restrictions.[3]

[2] Justice Holmes in *Rearick* v. *Pennsylvania*, 203 U.S. 507, 512, 27 S.Ct. 159, 160, 51 L.Ed. 295 (1906), said that "'Commerce among the several States' is a practical conception, not drawn from the 'witty diversities' (Yelv., 33) of the law of sales."

[3] The classical explanation of the reasons for establishing a *per se* rule as an exception to the rule of reason is given by the late Mr. Justice Black in *Northern Pacific Co.* v. *U. S.*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958):

> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210, 60 S.Ct. 811, 838, 84 L.Ed. 1129; division of markets, *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 46 L.R.A. 122, aff'd, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136; group boycotts, *Fashion Originators' Guild* v.

One dangerous consequence of the decision is the possible impetus given to potential erosion of the *per se* ban on price-fixing. As Judge Browning pointed out in his cogent dissenting opinion: "Indeed, 'any argument that can be made on behalf of exclusive territories can also be made on behalf of resale price maintenance.'" 537 F.2d at 1019. And Mr. Justice White observes in his concurring opinion that "the economic arguments in favor of allowing vertical nonprice restraints generally apply to vertical price restraints as well." —— U.S. at —— and note 10, 97 S.Ct. at 2568, as well as note 18 of the majority opinion at —— U.S. ——, 97 S.Ct. 2549.

Vertical restrictions may be understood as those imposed by agreement between a manufacturer and a distributor or dealer, where the parties occupy a different rank in the hierarchy of distribution. Horizontal restrictions may be understood as those imposed by agreement between parties of the same rank or level in the system of distribution.

*A priori* one would have supposed that this was a factitious and unprofitable distinction; that if a contract or agreement between two parties operated to restrain trade it would not matter what position either of them occupied in the distribution system. However, the distinction is recognized as very important and controlling by the Supreme Court in the *Continental T.V.* case. One would also have supposed that the transfer of title test affords a simple and workable rule, based on the fundamental distinction between *meum* and *tuum*. One's power to do what

*Federal Trade Comm'n*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949; and tying arrangements, *International Salt Co.* v. *United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20.



he will with his own (see Mt. 20:15) would seem quite different from his power to do what he will with the property of someone else.

Strangely, the Court does not cite at all two landmark cases, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), and *U.S.* v. *General Electric Co.*, 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926), which are mentioned only in Mr. Justice White's concurring opinion. And *Addyston Pipe*,[4] the *fons et origo* of the law on price-fixing, division of customers, and allocation of territory, is entirely overlooked in all the opinions.

Hence it is probable that the *Continental T.V.* case will produce as much confusion and controversy as the *Schwinn* case which it superseded.[5] A full discussion of the subject, frequently cited in the *Continental T.V.* case, is contained in the American Bar Association Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition. It is likely that the long-continuing controversy on this topic which as there said (p. 98) "goes to the very heart of antitrust policy," will not be forever laid to rest by the impact of the Supreme Court's latest pronouncement.

For present purposes, however, we must accept *Continental T.V.* as the *dernier cri* on the subject-matter involved, scrutinize carefully its scope, and see how it squares with the views of the Court of Appeals.

[4] *Addyston Pipe and Steel Co.* v. *U.S.*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899).

[5] For the literature on *Schwinn* to which the Court adverted, see note 13 of its opinion.

Careful examination of the Supreme Court's *Continental T.V.* decision and the opinion of the Court of Appeals in the case at bar reveals no inconsistency or conflict which would warrant departure from the mandate of the latter court to proceed with trial of the issue of damages under the territoriality count. This conclusion is supported by a number of reasons:

1. The *T.V.* case deals only with vertical restrictions. The Supreme Court opinion speaks of such restrictions *passim.* In note 18, for example, it is said: "As in *Schwinn,* we are concerned here only with nonprice vertical restrictions." In the last paragraph of the opinion the Court says: "In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn.*" In note 28 the Court says: "There is no doubt that [horizontal] restrictions . . . would be illegal *per se,*" citing cases.

In the case at bar, however, the Court of Appeals found that the evidence established a *horizontal* restraint, which would be a violation *per se* without regard to the *Schwinn* rule. "In the present case . . . the record reveals an explicit agreement between PEI and each dealer to divide territories. Thus a horizontal restraint, a *per se* violation of the Sherman Act, could be found on this record, even if the *Schwinn* prohibition of vertical restraints were not dispositive." 531 F.2d at 104.

2. The *T.V.* case dealt only with a "location" clause, similar to that approved in *Kaiser* v. *General Motors Corp.,* 396 F.Supp. 33, 39—41 (E.D. Pa. 1975), aff'd 530 F.2d 964 (C.A. 3, 1976).[6]

[6] Cited in note 11 of the *T.V.* opinion.



At the very beginning of Mr. Justice Powell's opinion, he speaks of franchise agreements "barring retailers from selling franchised products from locations other than those specified in the agreements," and goes on to say that the *Continental T.V.* case "presents important questions concerning . . . *these* restrictions." [Italics supplied].

It appears clearly from the Ninth Circuit opinion that the Sylvania restriction was a *vendor* restriction and not a *vendee* restriction; that "each Sylvania dealer was *free to sell to any buyer he chose*" from his authorized location. 537 F.2d at 990.

In violation of the purely locational restriction in that case, Continental did not merely seek to sell from its San Francisco location to customers located elsewhere, but opened a new (unauthorized) location in Sacramento to which it moved Sylvania merchandise. 537 F.2d at 984—85.

In the case at bar, however, the effect of the territorial restriction is to forbid sales to customers located outside the dealer's assigned territory. This is in fact a *vendee restriction* rather than a mere *location restriction.* Pitchford had its location in Pittsburgh, where the central office of U.S. Steel is located, and by reason of good relations with that corporation's headquarters personnel, sought to make, and doubtless could have made in the absence of defendant's restrictive practices, sales from the Pittsburgh location of Pitchford territory.

The economic impact of defendant's restrictions was thus more serious than that of the purely locational restrictions involved in the *T.V.* case.

3. The *T.V.* case dealt with a location restriction standing alone, and unconnected with a price-fixing plan. The

jury had expressly so found. The jury answered "No" to the question whether Sylvania had engaged in "location restrictions and price fixing as an integral part of a single distribution policy"; and "Yes" to the question whether *Sylvania* had violated the antitrust laws "with respect to locations restrictions alone." 537 F.2d at 985—86.

The Supreme Court emphasized that the jury found that Sylvania had violated the antitrust laws "with respect to location restrictions alone." In note 9 the Court commented: "Most important was the jury's rejection of the allegation that the location restriction was part of a larger scheme to fix prices."

As quoted above in connection with point 1, note 18 of the *T.V.* opinion emphasizes that "we are concerned here only with *non-price* vertical restrictions." [Italics supplied].

In the case at bar, however, it is manifest that defendant's territorial restrictions were part and parcel of a comprehensive price-fixing policy. In the apt words of Judge Wisdom in *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934, 948 (C.A. 5, 1975), the defendants' restraints "were ancillary to an illegal price fixing scheme." Even on a printed record, without being able to see defendant's vice-president in charge of sales attempt to foist the blame for distribution of price directions to dealers upon the mailing clerk, (Tr. 2620-24) the Court of Appeals squarely found that the evidence supported a finding of price-fixing. 531 F.2d at 98.

The fact that plaintiff failed to prove loss or damage attributable to the price-fixing violation[7] (*ibid.*, at 99) does

[7] There was little evidence that Pitchford was a "price-cutter" and would have sold at a lower price if free to do so. The only



not detract from the integration of price-fixing and territorial restrictions characterizing the defendant's sales practices of which both types of restraint formed part and parcel.

4. Finally, even if in the case at bar the Court had not mentioned *Schwinn* at all[8] or had tried the case under the *T.V.* rule of reason, the outcome would have been no different, and from the practical standpoint no harm has been suffered by defendant by reason of the trial court's failure to anticipate the overruling of *Schwinn* by the *T.V.* case. Any error (in the light of hindsight) committed is harmless.

This is true because in fact the trial court permitted defendants to offer all the testimony which they desired to present in order to show that the territorial restrictions which they included in their dealer contracts were in fact reasonable, and were justified by the nature of the product, its danger to the public if not properly operated, and the need for expert service.[9]

instance of a price concession which comes to mind is that of a sale to a hospital in 1969 (see 531 F.2d at 98) where defendants finally absorbed much of the reduction in the guise of a donation to the hospital (which would now be described as "laundered money") and the inviolability in principle of the fixed list price was maintained.

[8] *Schwinn* was mentioned only peripherally and incidentally in the charge when discussing price-fixing. All that the Court said was: "Another refinement, which we don't need to go into here, is another recent Supreme Court case about bicycles. The name of that company was Arnold Schwinn." Tr. 3230.

[9] Defendants were doubtless seeking the benefit of a holding such as that in *Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932, 936-39 (C.A. 3, 1970), or *U.S.* v. *Jerrold Electronics Corp.*, 187 F.Supp. 545, 557 (E.D. Pa. 1960).

It would be difficult to imagine any significant new evidence which defendants could adduce under the rule of reason if a new trial were had. Doubtless the resourcefulness and ingenuity of counsel could come up with something, but it is extremely doubtful whether the additional evidence would be of sufficiently substantial character to warrant a new trial in a protracted antitrust case.

At the previous trial the jury specifically negated defendant's rule of reason defense by answering "No" to the interrogatory: "Were legitimate business reasons (such as poor performance) a predominantly contributing factor to termination of Pitchford Scientific Instruments Corporation's dealership on September 10, 1970?"

For the foregoing reasons the *T.V.* case does not appear to be applicable to the case at bar in such a manner as to conflict with the rulings of the Court of Appeals in the case at bar or to warrant suspension of the mandated trial with respect to the amount of damages under the territoriality count.

Accordingly, defendant's motions are denied, and the trial shall continue.



## Opinion of the United States District Court for the Western District of Pennsylvania, November 23, 1977

UNITED STATES DISTRICT COURT

W. D. PENNSYLVANIA

Civ. A. No. 70-1461

November 23, 1977

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PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,

*Plaintiff,*

v.

PEPI, INC., NORTH AMERICAN PHILIPS CORP., and PHILIPS ELECTRONIC INSTRUMENTS, INC.,

*Defendants.*

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OPINION

DUMBAULD, *District Judge*

The instant proceeding is for the purpose of fixing the counsel fees which plaintiff is entitled to recover in a successful[1] private antitrust case.[2] 15 U.S.C. § 15 provides that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

[1] Plaintiff recovered a verdict of $312,349.00, which tripled is $934,047.00.

[2] For prior proceedings in the case at bar see 531 F.2d 92 (C.A. 3, 1976), and 435 F.2d 685 (W.D.Pa. 1977).

trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Although the case at bar was not a class action (where there is always suspicion that no one but counsel benefits substantially from the fund created by the almost inevitable settlement[3]) the criteria set forth in *Lindy Bros.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166-69 (C.A.3, 1973), 540 F.2d 102, 116-18 (C.A.3, 1976), constitute the appropriate measuring rod for determining a reasonable fee.

Stated succinctly, those criteria prescribe a basic time charge (sometimes called "lodestar"), adjusted for the factor of contingency and any unusual quality of work performed.[4]

Plaintiff's application and two affidavits set forth time and other details, purporting to comply with *Lindy* requirements, and seek an award of $567,314.30 (double the basic time charge or "lodestar" of $283,657.15[5]) plus expenses of

[3] See 540 F.2d at 126, n. 20. See also Francis R. Kirkham, "Complex Civil Litigation," address at the Pound Conference, 70 F.R.D. 139, at 205-207.

[4] In evaluating quality the court should consider the complexity and novelty of the issues, the excellence of trial work observed, and the amount of the recovery obtained. 487 F.2d at 168. With respect to both contingency and quality factors, the court should identify, quantify, and justify any deviations from the basic time charge. 540 F.2d at 118.

[5] Application, p. 9. Plaintiff's brief, p. 5 gives the basic figure as $289,557.65, but half of $567,314.30 is $283,657.15. Addition of the separate items also yields $283,657.15.



$50,841.64. Defendants, in brief and oral argument, have accepted the time record as authentic, but contest the hourly rates used and contend that certain items are improper to be included. We shall therefore take plaintiff's calculations as the starting point, and subtract any amounts found to be excessive upon consideration of the points raised by defendants.

We note at the outset that defendants often argue that certain items might be proper in a contractually agreed upon fee with a client, but should not be collected from defendants who are required to pay by virtue of statutory compulsion. It is of course true that the fee prescribed by 15 U.S.C. § 15 is imposed *in invitum* upon losing defendants. But the statute calls for a *reasonable* fee, not a bargain-basement figure. As with railroad rates, there is a "zone of reasonableness," implying a reasonable minimum as well as a reasonable maximum.[6]

The prevailing party in a private antitrust case is entitled to a fair fee covering all services which competent counsel would reasonably deem appropriate. The fact that defendants' counsel (if representing plaintiff) might have thought it safe to cut corners does not mean that plaintiff's counsel should not be compensated for work which a reasonable and prudent antitrust lawyer would have deemed advisable under the circumstances.

The late Emory Buckner (preceptor in trial practice of the late second Justice Harlan[7]) is reputed to have said

[6] *U. S.* v. *C., M., St. P. & P. R. R. Co.*, 294 U.S. 499, 506, 55 S.Ct. 462, 79 L.Ed. 1023 (1935).

[7] David L. Shapiro (ed.), *The Evolution of a Judicial Philosophy: Opinions and Papers of Justice John M. Harlan* (1969) xx.

that it is easy to over-try a case but impossible to overprepare a case.

A victorious antitrust plaintiff is entitled to receive a counsel fee commensurate with the thoroughness of preparation, as well as skill in trial, which Buckner's philosophy envisaged.

We shall therefore view the various issues contested here with the attitude that, merely because the obligation to pay the fee is statutory, the size of the fee need not be a niggardly or skimpy pittance, but that plaintiff was intended by Congress to receive fair and reasonable compensation for all legal services reasonably necessary in connection with the case.

The foregoing principle leads to rejection of defendants' contention that because the case was tried twice counsel is not entitled to compensation for work done at the second trial, on the theory that such work was "duplication."[8] It seems clear that it is reasonably necessary to retry a case when an appellate court directs a retrial. Counsel are not to be penalized by being required to work for nothing as punishment for failure to know at the first trial what the Court of Appeals was going to do.

The same reasoning requires rejection of defendants' second contention, that the fee should be reduced because plaintiff won on appeal only with respect to one issue, and lost on other issues.[9] Apart from the fact that the Court of Appeals did hold that price-fixing and other allegations had in fact been proved, but that no sufficient proof of damages (injury to business or property as required by

[8] Defendants' brief, p. 2.

[9] Defendants' brief, p. 3.



15 U.S.C. § 15) had been adduced, it seems clear that a reasonable and prudent antitrust lawyer (not necessarily one as thorough as Emory Buckner) would have litigated these issues in the reasonable exercise of professional judgment. There was sufficient merit in the points raised to justify their inclusion in the case. They were not frivolously argued merely for harassment or vexation, or for purposes of delay.

The same principle requires rejection of defendants' argument that services arising out of certiorari proceedings in the Supreme Court should be excluded.[10] While notoriously more petitions for certiorari are unsuccessful than are successful, filing them is recognized as part of the game, and we can not say that the mutual petitions in this case were not resorted to in the normal exercise of reasonable professional diligence.

Defendants object to the charge for the use of Lexis computer service, describing it as "an impermissible anthropomorphism.[11]" This service, however, replaces by instantaneous and supposedly infallible retrieval, many hours which would be billable if performed by human talent. The amount allowable, however, is merely the cost of the service. It is not included as billable hours of legal service. The item is expressed in terms of hours merely because the Lexis machine is made available on that basis to users.

Similar reasoning leads to rejection of defendants' objection to plaintiff's out-of-pocket cost items. These are perhaps not taxable by the Clerk as court costs as authorized by statute, but are certainly expenses which a rea-

[10] Defendants' brief, p. 7.

[11] Defendants' brief, p. 9.

sonable and prudent antitrust lawyer would incur for the benefit of his client's case.

We note that 15 U.S.C. § 15 does not award merely court costs to a successful antitrust plaintiff, but "the cost of suit." This is a more comprehensive term, evidently embracing "the expense of prosecuting the suit to a successful conclusion." The court costs in the technical sense are of course included in "the cost of suit," but other necessary and reasonable expenses are also included (except the attorneys fee, which is specified separately as an additional item to be paid to plaintiff).

In this connection we note also that the time spent in litigating the amount of the fee payable is also to be included as part of the losing defendant's obligation.

The statute here makes the fee a debt due to the plaintiff, to make him whole by redressing the wrong done by the violation of the antitrust laws. Just as the relief *pendente lite* afforded by a preliminary injunction is designed to place a plaintiff in the same situation he would be in if the litigation could be decided immediately,[12] so the award of cost of suit and attorney fee in an antitrust case is designed to afford the plaintiff the relief to which

[12] As an international tribunal said, by this procedure the courts "seek to remedy the delays of the judicial process, so that to the extent possible the outcome of the case is the same as if it could be terminated in a day." As an illustrious Italian authority on civil procedure stated, the relief afforded should be as advantageous to the plaintiff as if it were obtained at the moment of filing the complaint; the duration of the lawsuit should not bring detriment to the plaintiff. Quoted in Dumbauld, *Interim Measures of Protection in International Controversies*, (1932) 20. To effect the intent of Congress in the antitrust statute, one needs only to substitute "expense of the lawsuit" for "duration [or delay] of the lawsuit."



he is entitled without any diminution by reason of the financial burden of making the judicial machinery work in his behalf.

Since the antitrust statute thus provides for collection of the expenses and attorney's fee by the plaintiff himself, in order to relieve him of the financial burden incident to litigation,[13] the considerations applicable to class actions are not pertinent here. The plaintiff in the case at bar is the only beneficiary of the instant litigation and the only party involved.[14] There is no occasion to consider the extent to which other passive parties who sat on their hands have been benefited by the exertions of lawyers who organized the enterprise and created, increased, or preserved a fund constituting a pie to be sliced up among various claimants. The attorneys here have no conflict of interest with their client.[15] The payment of a fair and reasonable fee by the wrongdoing defendants will merely lift a financial burden from the innocent party and place it upon the guilty.

Largely because of evils arising out of class actions, and the judicial reactions thereto,[16] the proceedings for deter-

[13] Commentators have emphasized that the high cost of litigation now makes it worthwhile to sue only if an amount of more than $50,000 is involved.

[14] Cf. *Lindy II*, 540 F.2d at 111, where this situation is reserved, and distinguished from a case where distribution of a fund is involved, and only the attorney benefits by the time spent in connection with the fee application.

[15] Cf. *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1020-21 (C.A. 3, 1977).

[16] Resulting in the elaboration of criteria which Judge Gibbons has characterized as a "significant advance in the law." 540 F.2d at 126.

mining fees are developing a regrettable tendency to "assume massive proportions, perhaps even dwarfing the case in chief."[17] To the extent that courts prescribe procedures which must be exhausted before a successful plaintiff may obtain the fruits of his invocation of the judicial process, the expense of complying with such procedures is just as much a condition precedent to a litigant's obtaining the relief to which he is entitled as the outlay for court costs which litigants (except the government and indigents under some circumstances[18]) must fork out before indulging in the privilege of seeking justice at the hands of a judicial tribunal. We therefore conclude that the time devoted by plaintiff's attorneys in prosecuting the fee application should not be excluded.

Having now disposed of defendant's collateral contentions, we must face the real meat of their objection to the application, namely the challenge to the hourly rates claimed by plaintiff's counsel.

Plaintiff's "top banana," Clayton A. Sweeney, seeks a rate of $60 per hour for the first trial in the District Court in 1974, a rate of $85 before the Court of Appeals and the Supreme Court of the United States, and a rate of $90 at the second trial before the District Court. This discrepancy is doubtless due to the progress of inflation rather than to any disesteem of the dignity of the appellate tribunals or any conviction that the District Court is a hard place in which to work.

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[17] *Lindy II*, 540 F.2d at 116. One is reminded of rate cases involving public utilities, such as *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

[18] *Boddie* v. *Connecticut*, 401 U.S. 371, 381, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).



For the second trial David B. Buerger at $150, James G. Park and John J. McLean seem to have participated for a brief interval in the firm's counsels, resulting in a charge of $342. The Court is not satisfied that Mr. Sweeney required the aid of any associates more equal in rank than himself, and will eliminate $342 from the "lodestar" figure.

Defendants vigorously attack the rates used in plaintiff's calculations because of the circumstance that the computer printouts attached to the Sweeney affidavit of October 20, 1977, disclose two columns, specifying different figures, described respectively as "required" and "recommended." As explained at oral argument, the "required" charge is for internal use by the firm, and indicates the minimum charge which would make it worthwhile for the firm to accept or handle a matter. The "recommended" figure that which the firm would ordinarily charge in the absence of special circumstances.

Defendants contended strenuously at oral argument that the lower or minimum rate should be used, especially since the fee here involved was not the result of contractual dealing with the firm by a client but was an obligation imposed upon defendants *in invitum* by statute. We have disposed of these arguments previously in this opinion, and concluded that defendants are not entitled to minimum or bargain rates, but must pay a fair and reasonable rate.

The Court at oral argument expressed some misgiving as to whether the "recommended" rate was merely a "paper rate" (to use the railroad and ICC expression for a rate which does not move any traffic but simply is published to comply with tariff publication requirements that there be an available tariff rate for every commodity which might be tendered to a carrier for transportation). In other

words, the Court wished to be satisfied that the "recommended" rates were "going" rates which were in fact regularly charged and collected by the firm in the normal course of business.

In response to the Court's request, Mr. Sweeney filed his supplemental affidavit of November 8, 1977, in which it is stated that the recommended rates "are regularly billed to a substantial number of clients of the firm and regularly obtained." In three antitrust cases handled by the firm during the period 1973-1977, the clients paid fees amounting to 94.1, 96.3, and 99.4% of the recommended rate. These were not contingent fee cases (apparently the firm was representing defendants in these cases). Mr. Sweeney also states that based on his familiarity with the "rates charged by firms of equal stature for similar work" the rates requested in plaintiff's application "are well within the range of rates charged in the cities of Pittsburgh and Philadelphia."

While it perhaps muddies the waters to refer to Philadelphia (New York, Chicago, Washington, D.C. and the West Coast are probably equally active centres of antitrust practice), the Court is satisfied that the hourly rates claimed are within the zone of reasonableness. Since in the three cases cited (where doubtless the firm puts its best foot forward) only 96.6% of list was collected, we shall reduce the claimed "lodestar" by 5%. That gives a figure of $269,474.29. Deducting the $342 previously mentioned we find the "lodestar" figure to be $269,132.29.

It remains to consider any appropriate adjustment for the contingency and quality factors.

Remembering that the quality factor compensates only for unusual performance in the particular case (normal



quality being reflected in the hourly rate commanded), we find that quality performance at a high level was observed during the course of both trials of the case at bar, not by reason of any specific incidents of outstanding virtuosity,[19] but by reason of the continuously sustained high pitch required by the vigorous and constant high quality opposition offered by defense counsel.

Just as a victorious tennis player or football team necessarily plays better against a good opponent, the legal skills of plaintiff's counsel were called forth and intensified by the spirited contest with able defense counsel. Quantifying, we conclude that a 20% increase, or $53,826.46, would be proper.

With respect to the contingency factor, we find that there is indeed substantial risk involved in the attempt to win and sustain on appeal and collect a large verdict in an antitrust case.

There was a time when the climate in the Supreme Court with respect to antitrust litigation was such that Mr. Justice Stewart could quip that the government always won.[20] That atmosphere is now believed to be more favorable to defendants.

In any event it never extended to private litigation, but to the major cases brought by the Department of Justice or the Federal Trade Commission in the public interest and affecting industry-wide conspiracies rather than the restrictive practices of a single company.

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[19] One particularly memorable instance of unusual performance may be noted: the devastating cross-examination of defendants' vice-president in charge of sales (Tr. 2620-24), referred to in 435 F.Supp. at 689.

[20] *U. S.* v. *Von's Grocery Co.*, 384 U.S. 270, 301, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966).

*Opinion of the United States District Court for the Western District of Pennsylvania, November 23, 1977*

Nor is the probability of success any brighter if decisions of the Court of Appeals are scrutinized. According to plaintiff's petition for certiorari at No. 75—1579 October Term, 1975 (c. d. 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed.2d 387), "Over the last 25 years, with one exception, no judgment or verdict for money damages has been passed upon [by the Third Circuit Court of Appeals] and permitted to stand." [Petition, p. 9]. We have not verified the correctness of this statement or reviewed the cases cited in support thereof by plaintiff at pages 9-12 of the petition, but assume its accuracy, being mindful of the tradition of scrupulous precision observed by Department of Justice attorneys in papers submitted to the Supreme Court, and presuming that a similar responsible attitude characterizes plaintiff's counsel in practicing before that august tribunal. Plaintiff's case therefore is subject to a very substantial risk or contingency factor.

We therefore conclude that a 100% contingency factor would be appropriate. There was an equal chance of winning or losing, in our judgment, when plaintiff undertook to challenge in the courts defendants' anticompetitive behavior. Doubling the "lodestar" figure gives $538,264.58. Adding the quality factor, as calculated above, brings the total to $592,091.04. To this, as we have previously determined, the out-of-pocket expenses of $50,841.64 must be added, giving a grand total of $642,932.68.

To this amount must be added thrice the amount of the verdict (or $934,047.00). Judgment is therefore entered for plaintiff and against defendants in the amount of $1,576,979.68.



## Judgment Order of the United States Court of Appeals for the Third Circuit, September 7, 1978

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-1105

ARTHUR H. PITCHFORD and PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,

vs.

PEPI, INC., PHILIPS ELECTRONIC INSTRUMENTS, INC., NORTH AMERICAN PHILIPS CORPORATION,
*Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D. C. Civil No. 70-1461)

Argued September 7, 1978

Before:

ALDISERT and HIGGINBOTHAM, *Circuit Judges,* and STERN, *District Judge.**

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

* Honorable Herbert J. Stern, of the United States District Court for the District of New Jersey, sitting by designation.

*Judgment Order of the United States Court of Appeals for the Third Circuit, September 7, 1978*

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/s/ ALDISERT
*Circuit Judge*

DATED: SEP 7 1978



**Denial by United States Court of Appeals for the Third Circuit of Petition for Rehearing, October 3, 1978**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-1105

ARTHUR H. PITCHFORD and PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,

vs.

PEPI, INC., PHILIPS ELECTRONIC INSTRUMENTS, INC., NORTH AMERICAN PHILIPS CORPORATION,

*Appellants.*

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge,* and
ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM,
*Circuit Judges,*

and STERN, *District Judge.**

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

* Honorable Herbert J. Stern, of the United States District Court for the District of New Jersey, sitting by designation.

*Denial by United States Court of Appeals for the Third Circuit of Petition for Rehearing, October 3, 1978*

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert

*Judge.*

Dated: October 3, 1978

Judges Rosenn and Garth would grant the petition for rehearing.



**Order Extending Time to File Petition for Writ of Certiorari, December 15, 1978**

SUPREME COURT OF THE UNITED STATES

No. A-550

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PEPI, Inc., et al.,

*Petitioners,*

v.

Arthur H. Pitchford, et al.,

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Order Extending Time to File Petition For Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 15, 1979.

/s/ William J. Brennan, Jr.
*Associate Justice of the Supreme Court of the United States*

Dated this 15th day of December, 1978.

**Letter from Andrew Kostecka, United States Department of Commerce, January 24, 1979**

UNITED STATES DEPARTMENT OF COMMERCE
Industry and Trade Administration
Washington, D.C. 20230

January 24, 1979

Mr. Richard Steuer
Kaye, Scholer, Fierman, Hays
and Handler
425 Park Avenue
New York, New York 10022

Dear Mr. Steuer:

This is in reply to your telephone request of January 19, 1979 asking for information on company-owned franchised units. The Department of Commerce conducts an annual survey of all known franchisors and is the only public or private source of substantive information on franchising.

The publication, *Franchising in the Economy, 1976-78* is based on individual returns from 1,166 firms, representing about 99 percent of all known franchisors. To supplement the report, franchising data for automobile and truck dealerships, gasoline service stations, and soft drink bottlers were included from other sources. The results of our seventh annual survey indicates that 810 franchisors operated with both company-owned and franchisee-owned units in 1976, while 356 franchisors operated no company-owned units.



If we can be of further assistance please feel free to contact us again.

/s/ ANDREW KOSTECKA
Andrew Kostecka
Commodity Industry Specialist
Office of Consumer Goods and Service Industries
Bureau of Domestic Business Development